SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 704

[illegible] NATIONAL BANK OF DAY CITY, PLAINTIFF IN ERROR,

vs.

[illegible] FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST [illegible] ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

[illegible] SEPTEMBER 9, 1918.

(25,594)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, PLAINTIFF IN ERROR,

vs.

GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 8, 1916.

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1 *Petition of Relators.*

To Hon. Grant Fellows, Attorney General of the State of Michigan:

Your petitioners, the undersigned trust companies, organized and doing business in the State of Michigan, respectfully represent that under the provisions of Section 11 (*k*) of the Federal Reserve Act, the Federal Reserve Board has undertaken to confer upon the First National Bank of Bay City, a corporation organized under the National Banking Law, and located in Bay City, in this State, the power to act as trustee, executor, administrator and registrar of stocks and bonds, under such rules and regulations as the said Board may prescribe, and that said Bank is assuming to exercise such powers within this State.

Your petitioners further represent that they have been advised by their counsel, and so aver, that the exercise of such powers by said Bank is in contravention of the laws of this State and also that the action of the Federal Reserve Board, in attempting to confer such powers upon said Bank, is in violation of the Constitutions of the United States and of this State, and that the public interests will be seriously and injuriously affected if said Bank is permitted to continue the exercise of such powers thus unlawfully conferred upon it.

Wherefore, your petitioners pray that appropriate proceedings, by information, in the nature of a quo warranto, upon the relation of your petitioners, be instituted in the Supreme Court of this State, in order that the right of said Bank to exercise such powers may be determined; and your petitioners hereby offer to furnish
2 such indemnity against the costs and expenses of such proceeding as may be directed.

Respectfully submitted,

UNION TRUST COMPANY.
DETROIT TRUST COMPANY.
SECURITY TRUST COMPANY.
MICHIGAN TRUST COMPANY.
GRAND RAPIDS TRUST COMPANY.

3 STATE OF MICHIGAN,
Supreme Court:

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

On motion of Grant Fellows, attorney general, leave is hereby granted to file the within information, in the nature of a quo warranto.

FLAVIUS L. BROOKE,
Chief Justice, Supreme Court.

Lansing, June 9th, 1915.

Information.

STATE OF MICHIGAN,
Supreme Court, ss:

Grant Fellows, attorney general of the State of Michigan, on the relation of the Union Trust Company, Detroit Trust Company and Security Trust Company, each of the City of Detroit, Michigan, and the Michigan Trust Company and Grand Rapids Trust Company, each of the City of Grand Rapids, Michigan, all being domestic corporations organized under act number 108 of the Public Acts of 1889, comes into said Supreme Court, according to the statute in such case made and provided, upon leave of said Court first obtained, and gives the Court here to understand and be informed that on, to wit: the eighth day of April, 1915, the First National Bank
4 of Bay City, a banking corporation organized under the laws of the United States and located in this State, was doing business in Bay City, Michigan, and that said First National Bank, of Bay City, through its directors and other officers, has since said date, to wit: April eighth, 1915, exercised, and still does exercise, certain franchises and privileges not conferred upon it by law, to wit: the right to act as trustee, executor, administrator, and registrar of stocks and bonds, under such rules and regulations as the Federal Reserve Board may prescribe, in contempt of the people of the State of Michigan, and to their great damage and prejudice;

Wherefore, said Attorney General prays for due process of law against said First National Bank of Bay City in this behalf, to be made to answer to the said People by what warrant said First Na-

tional Bank of Bay City claims to exercise said franchises and privileges.

GRANT FELLOWS,
Attorney General.

HENRY M. CAMPBELL,
Detroit,
JOHN G. JOHNSON,
Philadelphia,
Counsel for Relators.

5 STATE OF MICHIGAN,
Supreme Court:

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

Rule to Plead.

On filing information, in the nature of a quo warranto, pursuant to statute; and on motion of Grant Fellows, attorney general, pursuant to rule. It is ordered, that said respondent plead to such information within twenty days after service upon it of the summons issued herein, and a copy of this rule; and that in default thereof, judgment be entered against said respondent.

GRANT FELLOWS,
Attorney General.

6 STATE OF MICHIGAN,
Supreme Court:

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

In the Name of the People of the State of Michigan to the Sheriff of the County of Bay:

You are hereby commanded to summon First National Bank of Bay City, if found in your bailiwick, to appear in said Supreme Court to answer to an information, in the nature of a quo warranto, filed against it by Grant Fellows, attorney general of said State; such ap-

pearance and answer to be made in accordance with the rules and practice of the court, within twenty (20) days after service of this summons, together with a copy of said information and of a rule to plead.

Service of this summons shall be made on or before July 1st, 1915, which is the return day hereof.

Witness, Hon. Flavius L. Brooke, Chief Justice, and the seal of said Court, at the City of Lansing, the place of holding said Court, this 9th day of June, 1915.

CHARLES C. HOPKINS, *Clerk.*

7 *Plea.*

STATE OF MICHIGAN,
Supreme Court:

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

Now comes the said First National Bank of Bay City, Michigan, the respondent herein, by Gillett & Clark, its attorneys, and having read the information heretofore filed in the above entitled cause, for plea in behalf thereof, says:

1. Respondent is a duly organized and chartered National Banking Association, incorporated and existing under and by virtue of the Act of Congress providing for the organization and incorporation of National Banking Associations, and commonly known as the National Bank Act, approved June 3, 1864, and the amendments thereto.

2. That said Banking Association was originally incorporated under the name of the Bay National Bank of Bay City, on, to wit: December 4, 1882: That thereafter and on, to wit: the 28th day of April, 1891, such proceedings were had that the name of said Bank was changed from the Bay National Bank of Bay City to the First National Bank of Bay City; that thereafter, and on, to wit;

8 the 4th day of December, 1902, such proceedings were had that the corporate existence of said Bank was extended for a period of twenty (20) years from the 4th day of December, 1902, and for the information of the court there has been hereunto attached and made a part of respondent's plea,—

Exhibit A.—Articles of Association of the Bay National Bank of Bay City, dated December 1st, 1882.

Exhibit B.—The approval of the Comptroller of the Currency to the change of the name of the Bay National Bank of Bay City to the First National Bank of Bay City, which approval is dated April 28th, 1891.

Exhibit C.—The certificate of the Comptroller of the Currency extending the corporate existence of the First National Bank of Bay City for a period of twenty years from December 4, 1902, which certificate is dated December 4, 1902.

3. That under and by virtue of the provisions of an Act of Congress of the United States, commonly known as the Federal Reserve Act, approved December 23, 1913, and entitled, "An Act to provide for the establishment of Federal Reserve Banks, to furnish an elastic currency, to afford means of re-discounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes," respondent filed its application to become a member bank, so-called, and thereafter subscribed for and paid for its proportion of stock in the Federal Reserve Bank as evidenced by three certain receipts, a copy of the first of which is hereto attached and made a part of respondent's plea, and marked Exhibit D, and respondent is now a member bank of said Federal Reserve Bank, District No. 7.

9 4. That thereafter and on, to wit: the 13th day of April, 1915, on application made therefor, the said Federal Reserve Board granted to said First National Bank of Bay City, the right to act as trustee, executor, administrator, and registrar of stocks and bonds, a true copy of which permit is hereunto attached and made a part of respondent's plea, and marked Exhibit E.

5. That by virtue of such permit respondent is now acting as trustee for bondholders and is named as mortgagee and trustee in a certain real estate mortgage given to secure to said bondholders the payment of the bonds mentioned in said mortgage and interest thereon.

6. Respondent is advised and therefore so avers that such grant and permit are not in contravention of any state or local law of Michigan.

7. Respondent is advised and therefore avers that there is no public grievance to be remedied by this proceeding, but the writ is prosecuted solely for the private benefit of the relators and any other trust companies that may be hereafter organized in the State of Michigan.

8. Wherefore, by virtue of the National Bank Act, so-called, being an Act of Congress of the United States, entitled, "An Act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, and by virtue of the said Federal Reserve Act, approved December 23, 1913, the aforesaid respondent has used and exercised during the time mentioned in said information, and still uses and exercises the franchises and privileges, to

10 wit: the right to act as trustee, under such rules and regulations as the Federal Reserve Board may prescribe, as the said bank well might and still may, without this, that said First

National Bank of Bay City has usurped or does now usurp the rights, privileges or franchises aforesaid, or any of them, upon the said people of the State of Michigan, or any of them, as by the said information is averred, all of which matters the said Bank is ready to verify and prays that said information may be quashed and the proceedings dismissed.

Dated July 31, 1915.

GILLETT & CLARK,
Attorneys for Respondent,
Bay City, Mich.

EXHIBIT A.

Articles of Association.

For the purpose of organizing an association to carry on the business of banking under the laws of the United States, the undersigned subscribed for the stock of the Association hereinafter named, do enter into the following Articles of Association:

First. The name and title of this Association shall be "The Bay National Bank of Bay City."

Second. The place where its banking house or office shall be located and its operations of discount and deposit carried on, and its general business conducted, shall be the city of Bay City, county of Bay, and state of Michigan.

Third. The Board of Directors shall consist of nine shareholders.

The first meeting of the shareholders for the election of
11 Directors shall be held at the office of the First National Bank of Bay City, at three o'clock P. M. on the fourth (4) day of December, 1882, or at such other place and time as a majority of the undersigned shareholders may direct.

Fourth. The regular annual meetings of the shareholders for the election of Directors shall be held at the banking house of this Association on the second Tuesday of January of each year, but if no election shall be held on that day it may be held on any other day according to the provisions of Section 5149 of the Revised Statutes; and all elections shall be held according to such regulations as may be prescribed by the Board of Directors, not inconsistent with the aforesaid provisions of the said Section 5149 of the Revised Statutes.

Fifth. The capital stock of this Association shall be two hundred thousand dollars, to be divided into shares of one hundred dollars each; but the capital may be increased according to the provisions of Section 5142 of the Revised Statutes to any sum not exceeding seven hundred and fifty thousand dollars; and in case of the increase of the capital of the Association, each shareholder shall have the privilege of subscribing for such numbers of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The Board of Directors, a majority of whom shall be a quorum to do business, shall elect one of their number to be President

of this Association, who shall hold his office (unless he shall be disqualified, or be sooner removed by a two-thirds vote of all the members of the Board) for the term for which he was elected a Director;
and they shall have power to elect a Vice President, who
12 shall also be a member of the Board of Directors, and who shall be authorized in the absence or inability of the President from any cause to perform all acts and duties pertaining to the office of President, except such as the President only is authorized by law to perform, and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the Association; to fix the salaries to be paid to them, and continue them in office, or to dismiss them, as in the opinion of a majority of the Board, the interests of the Association may demand.

They shall also have power to define the duties of the officers and clerks of the association, to require bonds from them and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held and to appoint judges of the elections; to provide for an increase of the capital of the Association, and to regulate the manner in which such increase shall be made; and generally to do and perform all the acts that it may be legal for a Board of Directors to do under the Revised Statutes aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make, not inconsistent with law for the general regulation of the business of the Association and the management and administration of its affairs.

Seventh. This Association shall continue for the period of twenty years from the date of the execution of its organization certificate, unless sooner placed in voluntary liquidation by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law.

Eighth. These Articles of Association may be changed or amended
at any time by shareholders owning a majority of the stock
13 of the Association, in any manner not inconsistent with law, and the Board of Directors or any three shareholders, may call a meeting of the shareholders for this or any other purpose not inconsistent with law, by publishing notice thereof for thirty days in a newspaper published in the town, city or county where the Bank is located, or by notifying the shareholders in writing.

In Witness Whereof, We have hereunto set our hands this first day of December, eighteen hundred and eighty-two.

James Shearer,
Herschel H. Hatch,
Thomas Cranage, Jr.,
Charles E. Jennison,
Frank Fitzhugh,
Selwyn Eddy,
Gurden K. Jackson,
William E. Vaughan,
John Herbert Avery,
William H. Miller,
Albert B. Griswold,
Edward G. Williams,
Charles F. Eddy,
Luther L. Hotchkiss,
John O. Woolson,
Eugene Fifield,
Jesse F. Romer,
John Shaw,
Robert S. Pratt,
John F. Eddy,

Charles A. Eddy,
Harry Griswold,
Frederick L. Gilbert,
John H. Yawkey,
Nelson Nelles,
Clark Moulthrop,
Charles G. Rogers,
John Mulholland,
Byron E. Warren,
William O. Clift,
Alexander Folsom.

I certify that the Articles of Association of The Bay National Bank of Bay City, located at Bay City, state of Michigan, were executed in duplicate and that one of the instruments so executed is the foregoing and that the other in all respects like the foregoing is on file with said Bank.

FREDERICK P. BROWNE, *Cashier.*

Bay City, Mich., Dec. 15th, 1882.

14 EXHIBIT B.

No. 2853.

E. Z. P.

Treasury Department,

Office of the Comptroller of the Currency.

Whereas, by satisfactory evidence presented to me, it appears that under the authority of the Act of Congress approved May 1, 1886, entitled "An act to enable national banking associations to increase their capital stock, and to change their names or location," shareholders owning two-thirds of the stock of the national banking association heretofore known as "The Bay National Bank of Bay City," located in the City of Bay City, in the State of Michigan, have voted to change the name of the said association to "The First National Bank of Bay City," and have complied with all the provisions of said Act relative to national banking associations changing their name.

Now Therefore, It Is Hereby Certified, That the name of the said association has been changed to "The First National Bank of Bay City," and that such change of name is approved by me, in accordance with the provisions of the act aforesaid.

In Testimony Whereof, Witness my hand and seal of office this 28th day of April, A. D. 1891.

[SEAL.]

E. S. LACEY,
Comptroller.

15 EXHIBIT C.

Treasury Department,

Office of the Comptroller of the Currency.

WASHINGTON, D. C., December 4, 1902.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that the First National Bank of Bay City, located in the city of Bay City, in the county of Bay, and state of Michigan, has complied with all the provisions of the Act of Congress to enable National Banking Associations to extend their corporate existence and for other purposes, approved July 12, 1882, now, therefore, I, William B. Ridgely, Comptroller of the Currency, do hereby certify that the First National Bank of Bay City, located in the city of Bay City, County of Bay, and State of Michigan, is authorized to have succession for the period specified in its amended articles of association, namely, until the close of business on December 4, 1922.

In Testimony Whereof, witness my hand and seal of office this fourth day of December, 1902.

[SEAL.] WILLIAM B. RIDGELY,
Comptroller of the Currency.

EXHIBIT D.

Federal Reserve Bank of Chicago.

District No. 7. No. of Shares, 180.

Certificate of Payment of First Installment of Capital Stock Subscription.

$3,000. No. of Shares, 180.

16 This is to certify that First National Bank of Bay City, Mich., has paid the sum of Three Thousand Dollars as the first installment of its subscription to one hundred and eighty shares of the capital stock of the Federal Reserve Bank of Chicago, such payment having been made in accordance with Section 2 of the Act of Congress, approved December 23, 1913, known as the Federal Reserve Act, and in response to call made by the Federal Reserve Board, pursuant to said Act.

This certificate is non-transferable and cannot be assigned as security for any indebtedness.

In Witness Whereof, the said Federal Reserve Bank of Chicago

has caused this certificate to be signed by its Governor, its corporate seal attached, attested by its Secretary, on this, Nov. 2, 1914.

[SEAL.] J. B. McDOUGAL,
Governor.

Attest:
W. F. McLALLEN,
Secretary.

(There are also two other certificates similar in all respects to the above, save the dates, for the two other installments, now in possession of respondent.)

17 EXHIBIT E.

Federal Reserve Bank of Chicago,
79 West Monroe Street.

OFFICERS:

James B. McDougal, Governor.
C. R. McKay, Deputy Governor.
W. F. McLallen, Secretary.
B. G. McCloud, Cashier.

DIRECTORS:

C. H. Bosworth, Chairman and Federal Reserve Agent.
J. B. Forgan, Chicago, Ill.
M. B. Hutchison, Ottumwa, Iowa.
E. L. Johnson, Waterloo, Iowa.
H. B. Joy, Detroit, Mich.
W. F. McLallen, Deputy Federal Reserve Agent.
E. T. Meredith, Des Moines, Iowa.
G. M. Raynolds, Chicago, Ill.
A. H. Vogel, Milwaukee, Wis.

Chicago ,April 13th, 1915.

First National Bank, Bay City, Michigan.

GENTLEMEN: I have the honor to inform you that the Federal Reserve Board has acted favorably upon your application for permission to act as Trustee, Executor, Administrator and Registrar of Stocks and Bonds, and this will be your formal notice to that effect.

Yours truly,

C. H. BOSWORTH,
Chairman.

C. H. B./L.

18 *Demurrer.*

STATE OF MICHIGAN,
Supreme Court:

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

Now Comes Grant Fellows, Attorney General of the State of Michigan, on the relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company and Grand Rapids Trust Company, relators, and by protestation, not confessing or acknowledging all or any of the matters and things in the plea of the respondent, heretofore filed, to be true in such manner and form as the same are therein set forth, doth demur to said plea, and for cause of demurrer avers that the said plea is insufficient in law to constitute an answer or defense to the information heretofore filed, for the following reasons:

(1) Because Section 11 (*k*) of the Federal Reserve Act in pursuance of which the Federal Reserve Board has attempted to confer upon the respondent the right to act as trustee, executor, administrator and registrar of stocks and bonds, under such rules and regulations as said Board may prescribe, is unconstitutional and void, in that Congress is not authorized by the Constitution of the United States to confer upon national banks the corporate powers specified in said section.

in said section.

19 (2) Because even if Congress itself possessed the authority to confer upon national banks the corporate powers specified in said section 11 (k), it cannot lawfully delegate such authority to the Federal Reserve Board.

(3) Because the granting of the corporate powers specified in said Section 11 (k) by the Federal Reserve Board to the respondent is in contravention of the laws and policy of this State.

Wherefore, the said Attorney General demands judgment of ouster against the respondent and prays that it may be enjoined and excluded from acting as trustee, executor, administrator or registrar of stocks and bonds, together with judgment against said respondent for the reasonable costs in this behalf sustained.

GRANT FELLOWS,
Attorney General.
HENRY M. CAMPBELL,
JOHN G. JOHNSON,
Counsel for Relators.

The undersigned counsel for Relators hereby certifies that the foregoing demurrer is not interposed for delay, and that, in his opinion, the demurrer is well founded in law.

HENRY M. CAMPBELL,
Counsel for Relators.

20 *Petition of Federal Reserve Board for Leave to File Briefs.*

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

September 25, 1915.

To the Honorable the Supreme Court of Michigan:

This day comes, by Counsel, the Federal Reserve Board, created and organized under an act of Congress approved December 23, 1913, and asks leave of court for permission to file a brief in support of the constitutionality of Section 11 (k) of the Act aforesaid, the legality and effect of which Section is involved in the above entitled cause, and respectfully represents to the Court:

(1) That pursuant to authority vested in it under the terms of the Act of Congress approved December 23, 1913, and known as the Federal Reserve Act, your petitioner, on April 8, 1915, granted to the respondent in this cause the right to act as trustee, executor, administrator and registrar of stocks and bonds.

(2) That the information filed and the process and pleadings in this cause have raised the issue of the right of your petitioner to exercise the powers vested in it by the Act aforesaid, and unless this right is sustained the respondent in this cause and other national banks created and organized under the laws of the United
21 States will be deprived of certain of their corporate rights and franchises.

FEDERAL RESERVE BOARD,
By M. C. ELLIOTT,
J. P. COTTON,
Counsel.

GILLETT & CLARK,
Attorneys for Petitioner.

22 *Order Permitting Federal Reserve Board to File Briefs.*

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court room, in the Capitol, in the City of Lansing,

on the 9th day of November, in the year of our Lord one thousand nine hundred and fifteen.

Present: The Honorable Flavius L. Brooke, Chief Justice; Franz C. Kuhn, John W. Stone, Russell C. Ostrander, John E. Bird, Joseph B. Moore, Joseph H. Steere, Rollin H. Person, Associate Justices.

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

On reading and filing the petition of the Federal Reserve Board created and organized under an act of Congress approved December 23, 1913, asking leave of court to file a brief and to be heard in this cause, and all parties in interest consenting thereto.

It is ordered, That the said Federal Reserve Board, through their counsel, are hereby authorized and permitted to file such brief or briefs as they may desire in this cause, copies to be served upon counsel for all parties ten days before hearing, and to be heard on the oral argument thereof as amici curiæ.

23 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the Twenty-third Day of July, in the Year of our Lord One Thousand Nine Hundred and Fifteen.

Present: The Honorable—

Flavius L. Brooke, Chief Justice.
Franz C. Kuhn,
John W. Stone,
Russell C. Ostrander,
John E. Bird,
Joseph B. Moore,
Joseph H. Steere,
Associate Justices.

26853.

GRANT FELLOWS, Attorney General, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

On reading and filing stipulations consenting thereto, It is Ordered that respondent in the above entitled cause may have twenty days

additional time in which to plead or demur that is to say forty days from the date of service of the summons.

24 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the Eighth Day of November, in the Year of our Lord One Thousand Nine Hundred and Fifteen.

Present: The Honorable—

John W. Stone,
Russell C. Ostrander,
Rollin H. Person,
Joseph B. Moore,
Joseph H. Steere,
Associate Justices.

26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

On reading and filing the petition of the Federal Reserve Board created and organized under an act of the Congress approved December 23, 1913, asking leave of court to file a brief and to be heard in this cause, and all parties in interest consenting thereto.

It is Ordered that the said Federal Reserve Board through their counsel are hereby authorized and permitted to file such brief or briefs as they may desire in this cause, copies to be served upon Counsel for all parties ten days before hearing and to be heard on the oral argument thereof as amici curiæ.

25 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twentieth day of January, in the year of our Lord one thousand nine hundred and sixteen.

Present: The Honorable John W. Stone, chief Justice. Franz C. Kuhn, John E. Bird, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Rollin H. Person, Associate Justices.

26853.

GRANT FELLOWS, Attorney General, ex Rel. UNION TRUST COMPANY et al.

vs.

FIRST NATIONAL BANK OF BAY CITY.

This cause coming on to be heard is argued by Mr. Campbell for Relators and by Mr. Clark and Mr. Elliott for Respondent and duly submitted.

26 *Opinion.*

STATE OF MICHIGAN,
Supreme Court:

Filed September 26, 1916.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

v.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Before the Full Bench.

BROOKE, *J.:*

The attorney general of the State upon the relation of five trust companies, organized and doing business under the laws of the State, by permission granted, filed in this court an information in the nature of a proceeding quo warranto against the First National Bank of Bay City, by means of which relators question the right of the respondent to act as trustee, executor, administrator, and registrar of stocks and bonds under such rules and regulations as the Federal Reserve Board may prescribe, it being claimed that the exercise by respondent of said franchises and privileges is in contempt of the people of the State of Michigan and to their great damage and prejudice.

To the information so filed respondent interposed a plea setting out that it is a duly organized and chartered banking association incorporated under the National Bank act approved June 3, 1864, and the amendments thereto. Further answering, respondent says that under and by virtue of an Act of Congress, commonly known as the Federal Reserve Act, approved December 23, 1913, entitled "An Act to provide for the establishment of Federal Reserve Banks,
to furnish an elastic currency, to afford means of re-discount-
27 ing commerical paper, to establish a more effective supervision of banking in the United States, and for other purposes," it filed its application to become a member bank, and thereafter subscribed for and paid for its propertion of stock in the Federal Reserve Bank, whereupon it then became and now is a member bank of said Federal Reserve Bank, District 7. Further, that thereafter on the 13th day of April, 1915, on application made therefor, the said Federal Reserve Board granted to said respondent the right to act as trustee, executor, administrator, and registrar, of stocks and bonds, and that by virtue of such permit respondent is now acting as trustee for bondholders and is named as mortgagee and trustee in a certain real estate mortgage given to secure to said bondholders the payment of the bonds mentioned in said mortgage and interest thereon. Further, that respondent is advised that such

grant and permit are not in contravention of any state or local law in Michigan, and that there is no public grievance to be remedied by this proceeding, but that the writ is prosecuted solely for the private benefit of the relators and other trust companies that may be hereafter organized in the State.

To this plea the attorney general demurred upon the following grounds:

"1. Because Section 11 (*k*) of the Federal Reserve Act in pursuance of which the Federal Reserve Board has attempted to confer upon the respondent the right to act as trustee, executor, administrator and registrar of stocks and bonds, under such rules and regulations as said Board may prescribe, is unconstitutional and void, in that Congress is not authorized by the Constitution of the United States to confer upon national banks the corporate powers specified in said section.

"2. Because even if Congress itself possessed the authority to confer upon national banks the corporate powers specified in said section 11 (*k*), it cannot lawfully delegate such authority to the Federal Reserve Board.

"3. Because the granting of the corporate powers specified in said Section 11 (*k*) by the Federal Reserve Board to the Respondent is in contravention of the laws and policy of this State.

The question presented arises under Sec. 11 of the so-called Federal Reserve Act, which, among other things, provides:

"The Federal Reserve Board shall be authorized and empowered * * *

"(*k*) To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board
27½ may prescribe."

The first proposition raised by counsel for respondent is that the courts of this State are without jurisdiction to oust a corporation organized under the laws of the United States, or to enjoin such corporation from enjoying any or all of its franchises within the borders of the State. Although the question is not raised by the pleadings we think it should be determined adversely to the contention of counsel for the Federal Reserve Board, who, by leave of the court, were permitted to file a brief and make an argument in the case. No one would contend that final determination as to the validity of an Act of Congress does not rest with the Federal Supreme Court, but it is, we think, equally clear that any State may by quo warranto inquire by what authority any corporation exercises corporate rights within its borders. In the case of Attorney General v. A. Booth & Co., 143 Mich. 89, this court said:

"But proceedings in the nature of quo warranto are appropriate to try the right of a domestic corporation to act as such, and there would seem to be a close analogy between such a case and one where the proceeding is resorted to for the purpose of inquiry into the right of a foreign corporation to do business in another State than that of its organization, as it would be in the home State if the ob-

ject was to inquire into a right to exercise franchise in excess of those granted." (Citing cases.)

See also Mason v. Perkins, 73 Mich., 303; People v. Pres., etc. of Manhattan Co., 9 Wendell (N. Y.) 351; and cases cited in note 1 page 1426 of 32 Cyc.

The legality of the incorporation of the respondent is not questioned by the proceeding. The inquiry is instituted for the purpose of ascertaining whether its assumption of a franchise to do business of a certain character is with or without legal warrant, that business being apparently not incidental to banking, and peculiarly under the control of state laws. Counsel for relators present the question under three heads as follows:

"1. Congress is not authorized by the Constitution to confer upon national banks the corporate powers specified in Sec. 11 (*k*).

"2. Sec. 11 (*k*) is void because Congress cannot delegate to the Federal Reserve Board the authority attempted to be conferred by this section.

"3. The granting of authority to the respondent to act as trustee, executor, administrator, and registrar of stocks and bonds is in contravention of the laws and policy of this State.

28 In view of our conclusions hereinafter stated with reference to the third point raised, we find it unnecessary to give any consideration to points numbered one and two. An extended discussion on these questions will be found in the recent case of People of the State of Illinois v. Brady, 110 N. E. 864, (Ill.).

Assuming then for the purposes of this case that Congress might constitutionally enact the legislation in question, it will be noted that under subsection (*k*) of Sec. 11, the Federal Reserve Board is authorized to grant permission to National Banks to act as trustees, etc., only when the exercise of such franchises by them is "not in contravention of state or local law."

It is vigorously asserted on behalf of relators that such authorization to the National Banks of this State is in contravention of state law.

On the other hand, counsel for respondent state their position upon this point as follows:

"(*a*). There is nothing in the state law specifically prohibiting any person or corporation from acting as trustee, executor, registrar, etc.

"(*b*). In the absence of specific prohibition, the powers of a natural person to act in these capacities are unlimited, and the powers of a corporation are limited merely by the statute under which it is organized.

"(*c*). If national banks were organized under state laws it might be argued that an express prohibition was not required but that the mere absence of a state enabling act would be sufficient to limit their powers.

"(*d*). Inasmuch as national banks are organized under the acts of congress, no state enabling act is necessary to enable them to carry on a trust company business any more than to enable them

to carry on a banking business. Their authority is found in section 11K, and if this section is constitutional, its operation can be suspended only by a prohibitory statute of the state and not merely by the lack of an enabling state statute.

"(*e*). The authority given by section 11K does not compel the appointment of national banks as fiduciaries in any case, but merely permits such appointment. The probate court or other appointing authority still has full freedom of choice. A mere enlargement of such field of choice contravenes no law of the state.

"(*f*). All references to state "policy" are beside the point. The state legislature has had at least one regular session since the passage of the federal reserve act, and has not seen fit to prohibit national banks from qualifying as fiduciaries under section 11K. Its omission to do so is more significient than the claimed existence of a state policy, which is at best doubtful, vague and indefinite. The courts should require the state to express itself positively and definitely on a question of such importance."

29 Whether the subjects mentioned in Sec. 11 (*k*) are subjects over which the state has exclusive jurisdiction, or whether they or some of them may properly be subject to federal legislation, it is not necessary to determine. As to estates of decedents, however, see Dickinson v. Seaver, 44 Mich., 624; Lafferty v. Peoples' State Bank, 76 Mich. 35; American Missionary Ass'n v. Hall, 138 Mich., 247.

The real point in issue in this proceeding is whether the exercise by National Banks of the powers of trustees, executors, administrators, etc., is in contravention of local law.

An examination of our statutes clearly shows that the state has legislated very fully with reference to each of the subjects mentioned in Sec. 11 (*k*). Chapter 285 Howell's Statutes, 2nd Ed., is devoted to the subjects of trusts, and therein provision is made for their definition, regulation and administration. Chapters 290 to 301 Howell's Statutes, 2nd Ed., are devoted to laws relative to the settlement of estate of deceased persons. The administration of testate estates is by the law of this State committed to the person named as executor therein, if he is legally competent. 4 H. S. Sec. 11026.

In the case of intestate estates "to one or more of the persons hereinafter mentioned." 4 H. S. Sec. 11040.

While the word "person" is not defined in the statutes cited, to read them is to be convinced that the term was used in a restricted sense and was meant to apply to natural persons only and not to corporations. In reaching this conclusion we are not unmindful of the rule of construction, 1 H. S. Sec. 2 Sub.-Sec. 12, which provides:

"The word 'person' may extend and be applied to bodies politic and corporate, as well as to individuals."

Our determination as to the meaning of the word "person" as employed in these statutes is in harmony with the decision in Grunow v. Simonitsch, 21 N. D., 277, where in construing a similar statute, the court said:

30 "It is perfectly apparent to our minds that, until the enactment of §4682, the legislature had in the most explicit manner expressed its intention to restrict such appointments to natural persons. By the enactment of §4682 it is equally apparent that the only change which the legislature intended to make in the existing statute was to permit domestic annuity, safe deposit, and trust companies to receive such appointments."

See also In re Avery's Estate, 92 N. Y. Supp. 974.

In the year 1889 the law relative to the administration of estates of decedents and the execution of trusts was changed by enactment. 3 H. S., 2nd Ed. Chap 104, Sec. 6476-6510. Except as authorized under said act, no corporation in Michigan is empowered to administer trusts or to act as executor or administrator. A corporation may exercise only those powers conferred upon it by its charter under the law of its organization. In authorizing certain corporations organized under the act in question to execute trusts and administer estates, the legislature imposed very stringent conditions. It fixed a minimum capitalization; required the investment of a certain percentage of the capital in specified securities, and compelled the making of a fixed deposit with the State Treasurer for the purpose of securing depositors and creditors; it fixed the number and qualifications of directors and imposed penalties for fraud and embezzlement; it regulated investments of the corporation; and provided for complete supervision by the State Banking Department. Many of the regulations imposed could not be complied with by a National Bank.

We cannot agree with the contention of counsel for respondent that relators must point to a specific prohibitory law—a law absolutely forbidding National Banks to engage in the activities specified in Sec. 11 (*k*). We believe that the legislature, in the enactment of the so-called trust, deposit, and security statute, and clothing corporations organized thereunder with the powers therein defined, by unavoidable inference excluded all other corporations within the state from the exercise of these powers. Now do we believe, as claimed by counsel for respondant, that the exercise of such powers by National Banks is at most contrary only to the public policy of the state. Our legislation upon the subjects involved in Sec. 11 (*k*) is so particular and so voluminous, and the legislative purpose so apparent,

30½ that we have no hesitation in reaching the conclusion that the exercise of the powers enumerated in Sec. 11 (*k*) by National Banks would be "in contravention of State law." While the decision in People of the State of Illinois v. Brady, supra, on this point is to the same effect, it is, of course, not controlling because the court of Illinois dealt with the statutes of that state, which differ materially from our own. The same may be said of the decision in Appeal of Woodbury, 96 Atl. (N. H.), 299, which arose in the State of New Hampshire.

It is, we think, clear that in the enactment of the trust legislation adverted to, the state sought to surround the execution of trusts and the administration of estates by corporations with certain safeguards which would be wholly lost if National Banks within the

state were permitted to exercise the functions enumerated under Sec. 11 (*k*).

We are therefore of opinion that the prayer of the relators should be granted and that the respondent be enjoined and excluded from acting as trustee, executor, administrator, and registrar of stocks and bonds. No costs will be allowed.

FLAVIUS L. BROOKE.

Endorsed: Filed Sept. 26, 1916. Jay Mertz, Clerk Supreme Court.

31 STATE OF MICHIGAN,
Supreme Court:

Filed September 26, 1916.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

v.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Before Stone, C. J., Kuhn, Ostrander, Bird, Moore, Steere, Brooke, Person, J. J.

OSTRANDER, *J.:*

If at any time in this State only individuals could execute trusts, manage trust funds, and act as executors and administrators of estates of deceased persons, it was because there had been created no corporation with the proper powers. It was within the power of the legislature to create, or provide for creating, such corporations, and, as the idea of corporate usefulness and efficiency became general, the legislature did provide for creating corporations with the necessary powers. Having provided for the creation of such domestic corporations, foreign corporations, having proper powers, may, upon such reasonable conditions as the legislature may prescribe, be admitted to do in this State what domestic corporations may do.

There is, therefore, no State policy opposed to corporate trustees, executors or administrators. No corporation, and for that matter no individual, can in any event act in any of the capacities indicated except by appointment. And a corporation, or an individual, in such relations, is governed by the laws of the State and the orders of State courts.

32 National banks are, and are not, foreign corporations. They are creatures of congress, agencies of the federal government, domesticated in the State. They may sue and be sued in the courts of the State, but the powers they shall possess, their management and control are beyond State authority, except that a bank like the respondent may not exercise certain powers—cannot lawfully possess them—in contravention of State law.

No State law is contravened—opposed, come into conflict with—because a corporation exercises the indicated powers, nor by the act of congress creating national banks. The legislature has not declared that national banks in this State shall not have the right "to act as trustee, executor, administrator, or registrar of stocks and bonds."

And I do not find in Brother Brooke's opinion reference to any State law that will be contravened if respondent continues to act in the indicated capacities. To say that because the legislature has required certain things of a domestic corporation as a condition to the exercise of the right and cannot require the same, or similar, things from national banks, therefore the exercise of the right by national banks will be in contravention of State law, seems to me to be an unsound argument. The bank is here, with such structure as congress has given it, and congress has in terms declared that among other functions it may perform that of a trustee, etc., if any body wants it to. The mere element of safety of a fund is a matter to be considered by those applying to the corporation to take charge of it, or by the court making an appointment. That one may regard the domestic corporation as the safer institution is not evidence that the other, if it acts, acts in contravention of State law. Certain safeguards surrounding the execution of trusts, etc., by domestic corporations are lost when individuals are appointed to execute them. The individual does not therefore act in contravention of State law.

Mr. Justice Brooke does not point out in what way, if
33 respondent acts within its apparent powers, the operations of any State law governing trusts, or the settlement of estates, will be interfered with. I am not content to rest so important a decision upon a doubtful inference. We must come, I think, to the question: Has respondent the power which the court is informed it is exercising? The question is a delicate one, less so, I think, because of the decisions of the federal court.

The power of congress to create national banks is sustained upon the theory that a bank, to the government,

"is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations." M'Culloch v. State of Maryland, 4 Wheat. 316.

"The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation. * * * Why is it that congress can incorporate or create a bank? This question was answered in the case of M'Culloch v. The State of Maryland. It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of the government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lend-

ing and dealing in money which is conferred by its charter? If it can, if it be as competent to the purposes of government without as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. * * * The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially." Osborn v. The Bank of the United States, 9 Wheat. 738.

See, also, Farmers' 'Mechanics' Nat. Bank v. Dearing, 91 U. S., 29.

Undoubtedly, all presumptions are in favor of the constitutionality of the act in question here and congress is the judge, within the exercise of its powers, of the functions a national bank should perform. But in the reasoning of the judges, in the opinions to which I have referred, I find, I think, a conclusive argument supporting the proposition that congress has exceeded its constitutional
34 powers in granting to banks the right to act as trustees, executors and administrators. If for mere profit it can clothe this agency with the powers enumerated, it can give it the rights of a trading corporation, or a transportation company, or both. There is, as Judge Marshall points out, a natural connection between the business of banking and the carrying on of federal fiscal operations. There is none, apparently, between such operations and the business of settling estates, or acting as the trustee of bondholders. This being so, there is in the legislation a direct invasion of the sovereignty of the State which controls not only the devolution of estates of deceased persons and the conducting of private business within the State, but as well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors and administrators. Such an invasion I think the court may declare and may prevent by its order operating upon the offending agency. I concur, therefore, in the conclusion arrived at by Mr. Justice Brooke.

RUSSELL C. OSTRANDER.
J. W. STONE.
FRANZ C. KUHN.
JNO. E. BIRD.
J. H. STEERE.
ROLLIN H. PERSON.

I think the writ ought to be granted for the last reason stated by Justice Ostrander.

JOSEPH B. MOORE.

Endorsed: Filed Sept. 26th, 1916. Jay Mertz, Clerk Supreme Court.

35 STATE OF MICHIGAN,
Supreme Court:

At a session of said Court held in the City of Lansing, State of Michigan, on the 26th day of September, A. D. 1916.

Present: Hon. John W. Stone, Chief Justice; Hon. Franz C. Kuhn, Hon. Russell C. Ostrander, Hon. John E. Bird, Hon. Joseph B. Moore, Hon. Joseph H. Steere, Hon. Flavius L. Brooks, Hon. Rollin H. Person, Associate Justices.

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

The above entitled cause coming on to be heard upon the information of the Attorney General, the plea of the respondent, and the demurrer to said plea filed by the Attorney General.

36 And the said Grant Fellows, Attorney General, Henry M. Campbell and John G. Johnson, counsel for relators, Gillett & Clark, counsel for respondent, and M. C. Elliott and J. P. Cotton, counsel for the Federal Reserve Board, appearing by special leave of the Court, having been duly heard, and it appearing to the Court that the respondent is exercising certain franchises and privileges not conferred upon it by law, to-wit: the right to act as trustee, executor, administrator and registrar of stocks and bonds.

It is ordered, adjudged and decreed that said First National Bank of Bay City be, and is hereby enjoined and excluded from exercising said franchises and privileges, to-wit: the right to act as trustee, executor, administrator and registrar of stocks and bonds.

It is further ordered, adjudged and decreed that no costs be allowed in said proceeding.

36½ [Endorsed:] Quo Warranto No. 26853. State of Michigan Supreme Court. Grant Fellows, Attorney General of State of Michigan, on the relation of Union Trust Company et al., relators, vs. First National Bank of Bay City, respondent. Judgment of Ouster. Henry M. Campbell and John G. Johnson, Counsel for Relators, Union Trust Building, Detroit.

37 STATE OF MICHIGAN,
Supreme Court:

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

The petition of the above named respondent, First National Bank of Bay City, hereby sets forth that on the 26th day of September, 1916, the Supreme Court of the State of Michigan made and entered a final order and judgment herein in favor of the above named relators and against the above named respondent, in which final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of said respondent, First National Bank of Bay City all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said Supreme Court of the State of Michigan is the highest court of the said State of Michigan in which a decision in this suit and in this matter could be had.

Wherefore, First National Bank of Bay City petitions and prays that a writ of error from the Supreme Court of the United States may be issued in this behalf to the Supreme Court of the State of Michigan for the correction of errors so complained of and that a transcript of record proceedings and papers in this cause duly
38 authenticated may be sent to the Supreme Court of the United States.

Dated this 24th day of October, 1916.

H. M. GILLETT,
EDWARD L. CLARK,
Attorneys for Respondent, First National Bank of Bay City.

39 STATE OF MICHIGAN,
Supreme Court:

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

The above named respondent, First National Bank of Bay City, in connection with its petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Michigan, makes the following assignment of errors which it avers occurred upon the hearing and decision of the above entitled cause, to-wit:

(1) The Supreme Court of Michigan erred in holding that Section 11 (*k*) of the Federal Reserve Act so-called, being an act of Congress approved December 23, 1913 and entitled "An act to provide for the establishment of Federal Reserve Banks to furnish an elastic currency, to afford means of re-discounting commerical paper, to establish a more effective supervision of banking in the United States, and for other purposes," was and is void for the reason that the Congress of the United States in enacting the said Section 11 (*k*) exceeded the powers granted to the said Congress by the Constitution of the United States.

(2) The Supreme Court of Michigan erred in entering a judgment of ouster against the above named respondent, said judgment being based solely upon the decision that the act of Congress above mentioned was and is void as beyond the powers conferred upon the Congress of the United States by the Constitution of the
40 United States.

H. M. GILLETT,
EDWARD L. CLARK,
Attorneys for Respondent and Plaintiff in Error.

40½ [Endorsed:] 26853. State of Michigan Supreme Court. Grant Fellows, Attorney Gen'l of the State of Michigan, on the relation of Union Trust Company, Detroit Trust Company, Security Trust Company, and Grand Rapids Trust Company, Relators, vs. First National Bank, of Bay City, Respondent. Quo Warranto No. 26853. Petition for Writ of Error with Assignment of Errors. Gillett & Clark, 437-441 Shearer Bldg., Bay City, Mich.

41 STATE OF MICHIGAN,
Supreme Court:

At a session of said Court held in the City of Lansing, State of Michigan, on Wednesday the 25th day of October, A. D. 1916.

Present—Hon. John W. Stone, Chief Justice; Hon. Franz C. Kuhn, Hon. Russell C. Ostrander, Hon. John E. Bird, Hon. Joseph B. Moore, Hon. Joseph H. Steere, Hon. Flavius L. Brooke, Hon. Rollin H. Person, Associate Justices.

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

The above entitled matter coming on to be heard upon the petition of the Respondent therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Michigan and upon the examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter.

42 It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States and that the bond presented by said petitioner be and the same is hereby approved.

JOHN W. STONE,
Chief Justice of the Supreme Court of the State of Michigan.

42½ [Endorsed:] 26853. State of Michigan. Supreme Court. Grant Fellows, Attorney Gen'l of The State of Michigan, on the relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators, vs. First National Bank, of Bay City, Respondent. Quo Warranto. No. 26853. Order allowing writ of error from Supreme Court of United States. Filed Oct. 25, 1916. Jay Mertz, Clerk. Gillett & Clark, 437-441 Shearer Bldg., Bay City, Mich.

43 UNITED STATES OF AMERICA, *ss:*

To Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of State of Michigan, wherein First National Bank of Bay City is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John W. Stone, Chief Justice of the Supreme Court of the State of Michigan, this 25th day of October, in the year of our Lord one thousand nine hundred and sixteen.

JOHN W. STONE,
Chief Justice of the Supreme Court of the State of Michigan.

Attest:

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,
Clerk Supreme Court of Michigan.

43½ DETROIT, MICH., Oct. 27th, 1916.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

HENRY M. CAMPBELL,
Attorney for Defendants in Error.

44 Copy.

STATE OF MICHIGAN,
Supreme Court:

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

Know all men by these presents, that we, First National Bank of Bay City a national banking corporation of Bay City, Michigan,

as principal, and A. E. Bousfield and Wm. L. Clements of the same place, as sureties are held and firmly bound unto Grant Fellows as Attorney General of the State of Michigan in the sum of Five Hundred Dollars to be paid to the said obligee his successors and assigns; to the payment of which, well and truly to be made, we bind ourselves our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of October A. D. 1916.

Whereas, the above First National Bank of Bay City as respondent above named has filed its petition with the clerk of the Supreme Court of the State of Michigan for the issuance of a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Michigan.

Now, therefore, the condition of this obligation is such that if the above named respondent as plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

FIRST NATIONAL BANK,
Bay City, Mich.
WM. L. CLEMENTS, *Pres't.* [SEAL.]
D. H. BAKER, *Cashier.*
A. E. BOUSFIELD. [SEAL.]
WM. L. CLEMENTS. [SEAL.]

Sealed and delivered in the presence of—
A. E. HARRISON.
H. J. MARTIN.

STATE OF MICHIGAN,
County of Bay, ss:

William L. Clements and A. E. Bousfield the sureties above named each for himself makes oath that he is worth the penalty in the above bond over and above all debts, liabilities and exemptions.

JESSIE THOMPSON,
Notary Public, Bay County, Michigan.

Commission expires Apr. 16, 1919.

I hereby approve the foregoing bond and sureties thereon this 25th day of October, 1916.

JOHN W. STONE,
Chief Justice of the Supreme Court of the State of Michigan.

Attest:
JAY MERTZ,
Clerk Supreme Court of Michigan.

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Michigan before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Grant Fellows, Attorney General of the State of Michigan, on the relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company and First National Bank of Bay City, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution,
46 or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said First National Bank of Bay City as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of October, in the year of our Lord one thousand nine hundred and sixteen.

[Seal of the United States District Court, Eastern District of Mich.]

ELMER W. VOORHEIS,
Clerk of the United States District Court for the Eastern District of Michigan, Sixth Circuit.

Allowed by—
JOHN W. STONE,
Chief Justice of the Supreme Court of the State of Michigan.

Attest: JAY MERTZ,
Clerk of the Supreme Court of the State of Michigan.

47 To the Supreme Court of the United States:

The execution of the within Writ appears by the transcript of Record hereto annexed.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,
Clerk of Supreme Court of State of Michigan.

48 Supreme Court of the State of Michigan.

FIRST NATIONAL BANK OF BAY CITY, Plaintiff in Error,
vs.
GRANT FELLOWS, Attorney General, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Defendants in Error.

IN THE SUPREME COURT, *ss:*

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Justice of said Court and filed in my office, as appears of record and on file in said court; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the Writ of Error; the Writ of Error with allowance endorsed thereon, the Citation with acceptance of service endorsed thereon by the attorney for the adverse party, a copy of the bond duly approved, together with the assignments of error, in the Supreme Court of the United States.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Lansing this thirtieth day of October, in the year of our Lord, one thousand nine hundred and sixteen.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,
Clerk of the Supreme Court of Michigan.

Endorsed on cover: File No. 25,594. Michigan Supreme Court. Term No. 764. First National Bank of Bay City, plaintiff in error, vs. Grant Fellows, Attorney General of the State of Michigan, on the relation of Union Trust Company et al. Filed November 3rd, 1916. File No. 25,594.

Office Supreme Court, U. S.
FILED
DEC 1 1916
JAMES D. MAHER
CLERK

In the

Supreme Court of the United States

October Term, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN,
PLAINTIFF IN ERROR,
v.
GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Michigan.

MOTION BY PLAINTIFF IN ERROR TO ADVANCE.

EDWARD S. CLARK,
(BAY CITY, MICHIGAN)
Attorney for Plaintiff in Error.

In the

Supreme Court of the United States

October Term, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN, PLAINTIFF IN ERROR,

v.

GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Michigan.

MOTION BY PLAINTIFF IN ERROR TO ADVANCE.

Comes now the plaintiff in error by its counsel and respectfully moves the Court to advance this case for argument on a day during the present term convenient to the Court.

In quo warranto proceedings instituted by the Attorney General of the State of Michigan on the relation of certain trust companies, the plaintiff in error was enjoined and excluded from acting as trustee, executor, administrator and registrar of stocks and bonds under authority of sub-section (k), Section 11, of the Act approved December 23, 1913, known as the Federal Reserve Act, on the ground that Con-

gress had exceeded its constitutional powers in granting to national banks the right to act in the capacities mentioned.

This decision will prohibit all national banks in the State of Michigan from exercising the powers in question, and in view of this and a similar decision by the Supreme Court of the State of Illinois in the case of People ex. rel. First National Bank of Joliet v. Auditor of Public Accounts, in which the Act in question was declared unconstitutional, national banks throughout the United States, numbering more than seventy-five hundred, pending a decision by this Court, will be prevented by the doubt raised as to the constitutionality of the Act from freely exercising the powers granted them by Congress. It is, therefore, a matter of great public importance that the determination of this question should be expedited, to the end that the corporate powers of national banks created and used by the United States Government in the conduct of its fiscal affairs may be definitely determined.

Opposing counsel concur in this motion.

Edward F Clark.

Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FEB 28 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 764

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN,
PLAINTIFF IN ERROR.

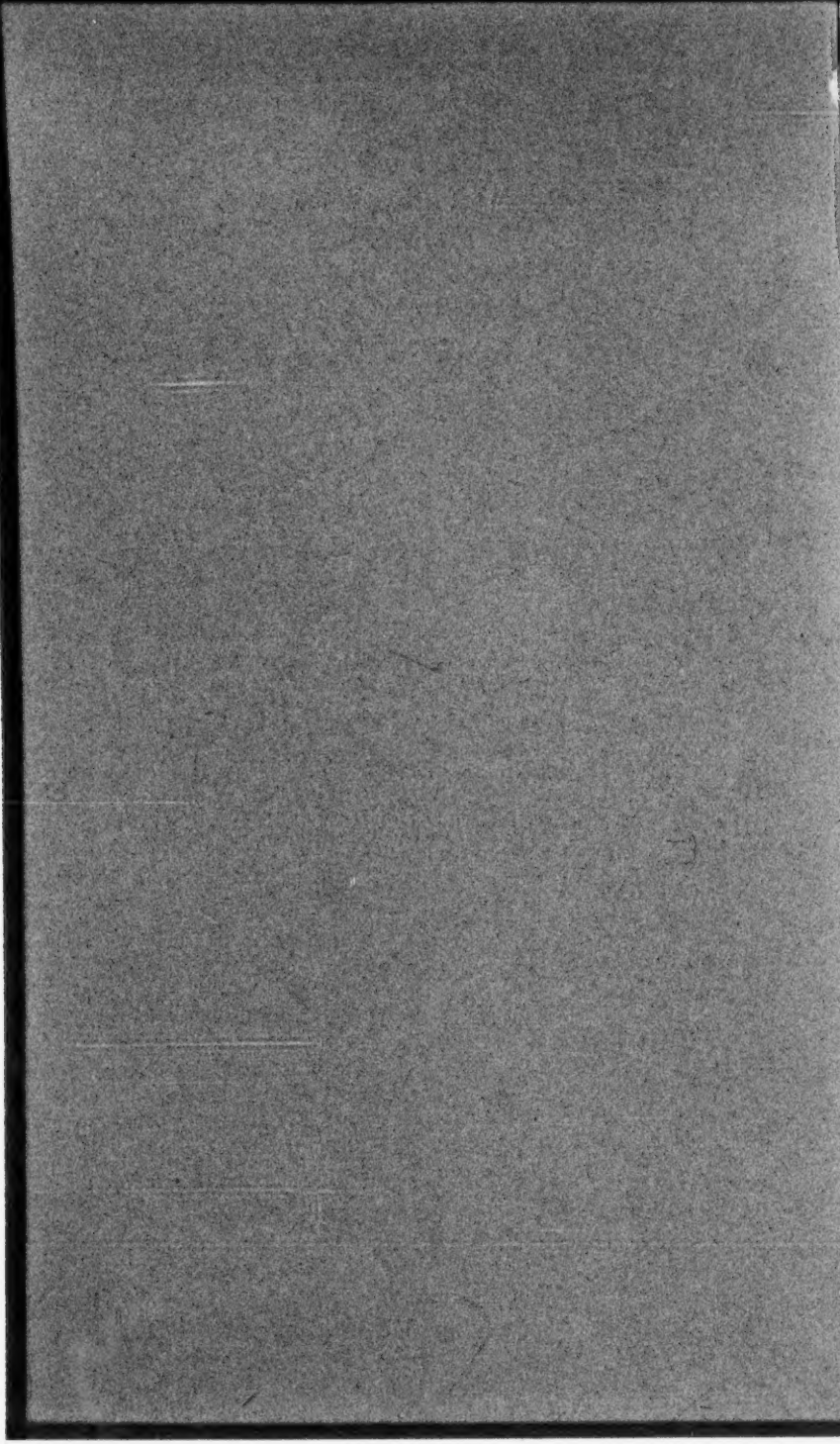
vs.

GRANT FELLOWS, ATTORNEY-GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY, ET AL.

In Error to the Supreme Court of the State of Michigan.

BRIEF FOR DEFENDANT IN ERROR.

HENRY M. CAMPBELL,
Detroit,
JOHN G. JOHNSON,
Philadelphia,
Counsel for Defendant in Error.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 764

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN, PLAINTIFF IN ERROR.

vs.

GRANT FELLOWS, ATTORNEY-GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY, ET AL.

BRIEF FOR DEFENDANT IN ERROR.

The present proceeding was brought by the Attorney-General of Michigan, by information in the Supreme Court, on the relation of all of the trust companies doing business in that State, to test the validity of Section 11 (k) of the Federal Reserve Act (Sec. 9794 U. S. Comp. Stat. 1913).

The case was heard upon the information, plea and demurrer to the plea. The Federal Reserve Board, upon leave granted, appeared by its counsel, filed a brief and made an argument upon the hearing before the Michigan Supreme Court.

The facts involved are undisputed, and are as follows:

Prior to the passage of the Federal Reserve Act, national banks were only authorized to do a commercial business, and their powers were carefully and minutely set forth in the act as follows:

> "(7) To exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this title."
>
> (*U. S. Comp. Stats.* 1913, *Sec.* 9661.)

The legal justification for the existence of national banks, as will be more fully pointed out hereafter, is that primarily they are instruments of the Federal Government, created for public purposes, as a necessary and proper means for executing the powers conferred upon Congress by the Constitution. The right to transact a private commercial business is recognized as incidental only, being one of the necessary features of a bank, without which it could not perform its public functions—an implication not to be extended beyond what necessity and the public interest demand.

The avowed purpose of the Federal Reserve Act, as expressed in its title, is strictly within the limitations above stated. The title is as follows:

> "An act to provide for the establishment of Federal Reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes."

With the single exception of Section 11 (k), the provisions of this act accord with the title and relate solely to commercial banking. Section 11 (k) was injected into the act at the "eleventh hour," practically without discussion in either house of Congress, and has no relation whatever to any of the other subjects treated in the act. It reads as follows:

> "The Federal Reserve Board shall be authorized and empowered * * *

(k) To grant, by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds, under such rules and regulations as the said board may prescribe."

There is nothing in the act expressly conferring upon all national banks the right to exercise the powers stated in the section, and no attempt is made in the act itself to regulate in any manner whatsoever the exercise of the powers, if granted. The whole subject, by this brief section, is committed to the unlimited and unrestrained discretion of the Federal Reserve Board, without rule or guidance.

The Federal Reserve Board by special permit granted to the plaintiff in error, the First National Bank of Bay City, Michigan, the right to act as trustee, executor, administrator and registrar of stocks and bonds. The Attorney General of the State filed an information against the bank contending that the section was void upon three grounds: (a) That Congress was not authorized to confer upon national banks the powers specified in the section; (b) That if Congress possessed the power it could not delegate its exercise to the Federal Reserve Board, and (c) That the granting of the powers specified is in contravention of the State and local law.

The Michigan Supreme Court sustained the contention of the Attorney General, and entered a judgment of ouster against the respondent, the First National Bank of Bay City, prohibiting the exercise of the fiduciary powers specified in Section 11 (k). All of the eight judges concurred in holding that Congress exceeded its constitutional powers in granting to the bank the right to act as trustee, executor, administrator and registrar of stocks and bonds. Justice Brooke also held that the action of the Board was in contravention of the State and local law.

Two questions are presented by this appeal:

First. Is Congress authorized, under the Federal Constitution, to confer upon national banks the right to act as trustee, executor, administrator and registrar of stocks and bonds?

Second: If Congress itself possesses such power, can it delegate its authority to grant such rights to the Federal Reserve Board?

POINT I.

Congress is not Authorized by the Constitution to Confer Upon National Banks the Corporate Powers Specified in Section 11 (k).

(a) *The United States Government is one of limited powers, and Congress possesses only such powers as are expressly enumerated and such incidental or implied powers as are necessary to give effect to the powers expressly conferred upon it. This proposition has been recognized since the foundation of the Government.*

> "This government is acknowledged by all to be one of enumerated powers. The principle that it can only exercise the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was pending before the people, found it necessary to urge. That principle is now universally admitted."
> *McCulloch vs. State of Maryland*, 4 *Wheat.* 316; *Marshall, C. J.*

> "The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."
> *Martin vs. Hunter's Lessee*, 1 *Wheat.* 304; *Story, J.*

> "The government of the United States is one of delegated, limited and enumerated powers. *Martin vs. Hunter's Lessee*, 1 *Wheat.* 304; *McCulloch vs. State of Maryland*, 4 *id.* 316; *Gibbons vs. Ogden*, 9 *id.* 1. Therefore, every valid act of Congress must find in the constitution some warrant for its passage. This is apparent by reference to the following provisions of the constitution: Section 1 of the first article declares that all legislative powers granted by the constitution shall be vested in the Congress of the United States. Section 8 of the same article

enumerates the powers granted to the Congress, and concludes the enumeration with a grant of power 'to make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof.' Article X. of the amendments to the constitution declares that 'the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.'

Mr. Justice Story, in his commentaries on the Constitution, says: 'Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress; if not, Congress cannot exercise it.'"

U. S. vs. Harris, 106 *U. S.* 635.

See also:

Kansas vs. Colorado, 206 *U. S.* 46, 82, 87.

(b) *The Federal Constitution does not expressly authorize Congress to create corporations for any purpose. Congress has, however, implied authority to create them, as an appropriate means of executing powers of government expressly granted. Beyond this the authority does not extend.*

"Among the enumerated powers we do not find that of establishing a bank or creating a corporation. * * * The power of creating a corporation, though appertaining to sovereignty, is not like the power of making war or levying taxes or regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished."

McCulloch vs. Maryland, 4 *Wheat.* 377, 379.

"The bank is not considered as a private corporation, whose principal object is individual trade and

> individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the Court, in the case of *McCulloch vs. State of Maryland*, is founded on and sustained by the idea that the bank is an instrument which is necessary and proper for carrying into effect the powers vested in the government of the United States."
>
> *Osborn vs. Bank of U. S.*, 9 *Wheat.* 738 (*Marshall, C. J.*).

A similar view of the nature of banks organized under the national banking laws has been frequently expressed by the Supreme Court of the United States.

> "National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service, through means appropriate to that end."
>
> *Farmers' Nat. Bank vs. Deering*, 91 *U. S.* 29.

> "National banks are instrumentalities of the Federal Government created for a public purpose."
>
> *Davis vs. Elmira Sav. Bank*, 161 *U. S.* 283 (*White, C. J.*).

To the same effect see:

> *Luxton vs. North River Bridge Co.*, 153 *U. S.* 529.
> *McClellan vs. Chipman*, 164 *U. S.* 357.

That such was the view of the framers of the Federal Constitution is apparent from the following contemporary opinion by Alexander Hamilton:

> "It is conceded that implied powers are to be considered as delegated, equally with express ones. Then it follows that as the power of erecting a corporation may be as well implied as any other thing, it may as well be employed as an instrument or mean of carry-

ing into execution any of the specified powers, as any other instrument or mean whatever. The only question must be, in this, as in every other case, whether the mean to be employed, or in this instance the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by Congress for superintending the police of the City of Philadelphia, because they are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes; because it is the province of the Federal Government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage."

26 *Harvard Law Review*, 672.

(c) *It is conceded that there is no express power in Congress to grant the rights specified in Section* 11 (k), *but plaintiff in error contends that an implied power exists upon one of two alternative theories as follows:*

> *"A. By recognizing it as the exercise by Congress of powers not previously defined, but necessarily and properly exercised to meet modern conditions."*
>
> *"B. By treating it as a mere administrative detail connected with the exercise of powers which are already clearly defined."*

Theory A. According to this theory it is contended that Congress has power to create any type of corporation it pleases, with such powers as it may choose to confer, provided only that in the opinion of Congress to do so would promote the interests of the Federal Government.

If this be true, Congress can create an independent corporation with no other power than to act as executor or administrator, and whose sole business would be to administer estates, notwithstanding the fact that it is well settled by this Court that the states have exclusive jurisdiction over such matters,—provided only that in the opinion of Con-

gress the interests of the Federal Government would thereby be promoted.

The statement of the proposition is its best refutation. If the only limit upon the powers of Congress is its own discretion, the idea that the Federal Government is a government of limited powers is a delusion.

The counsel for plaintiff in error do not appear, however, to be particularly enthusiastic over this proposition, and prefer to rely upon theory B.

Theory B. The doctrine of implied powers is one capable of endless abuse. Unless some rule is recognized which controls its application, it is liable to degenerate into an absolute discretion usurped by a legislative body of limited powers. The growing tendency of Congress to ignore constitutional limitations emphasizes the importance of insisting upon the enforcement of the rules which this Court has declared respecting such matters.

Mr. Justice Story has declared the rule applicable in such cases, which is quoted with approval in *U. S. vs. Harris,* 106 *U. S.* 636, as follows:

> "Mr. Justice Story, in his commentaries on the Constitution, says: 'Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, *the next inquiry must be whether it is properly an incident to an express power and necessary to its execution.* If it be, then it may be exercised by Congress; if not, Congress cannot exercise it."

Following this rule, Congress can only confer upon national banks such additional powers as are properly incidental to the exercise of their functions, as agencies of the Federal Government and necessary for that purpose.

No one will contend that the right to act as trustee, executor, administrator or registrar of stocks and bonds, is in any sense necessary or even appropriate to the fiscal operations of the Federal Government, and unless this rule, which, up to the present time, stands unchallenged, is to be repudiated, Congress has no authority to adopt Section 11(k).

Appellant, however, seeks to evade the application of this rule by claiming that "as soon as the implied power is defined and confirmed by the decisions of this Court it becomes in effect an express power" (Clark's brief, p. 11). Therefore, by a further implication, Congress may confer, in its discretion, any additional power incidental to the implied powers thus recognized and necessary to their execution—and it might as well be added, and so on, *ad infinitum*. A method of reasoning which, if carried out to its logical conclusion, would dispense with all limitation upon the power of Congress.

In pursuance of this claim, it is contended that Congress may confer these powers upon national banks as an incident to the successful prosecution of their private business *as banks*. But even if the rule extended thus far, the granting of the right to act as trustee, executor, administrator or registrar of stocks and bonds is in no sense necessary or appropriate to the exercise of banking powers. The distinction between banking and acting as trustee is fundamental. In the case of the bank the relation between it and its depositor is that of debtor and creditor. The depositor, in effect, agrees that his money shall pass to the bank and become its own to be used by the latter for its own profit. The obligation of the bank is an absolute one to repay the amount of money deposited, and the depositor is not concerned in the investment of the moneys which the bank may make. On the other hand, the relation of the trustee and the *cestui que trust* is precisely the reverse. Only the technical title and control of the trust property is vested in the trustee. Equitably and beneficially the property belongs to the *cestui que trust*. The trustee cannot use the trust property for his own profit or mingle the trust funds with his own or with other trust funds. His obligation is to hold and account for the particular property for the benefit of the *cestui que trust*. If, after exercising reasonable judgment, a loss occurs, it falls upon the trust fund, and not upon the trustee. The bank must repay its depositor in any event.

There is a growing tendency throughout the country to regulate and safeguard the exercise of fiduciary powers. In Michigan, as in a number of other States, the same corporation is not permitted to exercise both classes of powers. In those States where corporations are permitted to exercise both, it is quite generally recognized that trust properties should not be subjected to the hazards and liabilities of a

banking business, and the exercise of fiduciary powers is so restricted and the business so safeguarded and segregated, as in effect, to create two separate corporations, having separate and distinct functions.* It would be as great a breach of trust for such corporation to utilize its trust properties to promote its banking business as it would be to do the same thing with the properties of an independent trust company which might come under its control.

The most that could be gained by the addition of the fiduciary powers, when properly administered, would be such profits as might result from the employment of them. If this is a sufficient ground for an extension of powers, there would be much greater reason for granting to the banks authority to manufacture automobiles or engage in any other more profitable business, so as to realize greater profits.

It is contended in support of this attempt to usurp an authority not belonging to Congress that national banks are brought into competition with state banks, which exercise fiduciary as well as banking powers, and that unless national banks are permitted to exercise like powers, they will not realize the profits which they otherwise might.

A moment's consideration will show, however, that this idea of competition is merely a pretense upon which to hang the claim for additional powers—powers which Congress has no right to confer and which belong exclusively to the States. The state banks which may be said to compete with national banks have no greater or different banking powers than the national banks themselves, and any competition between them must necessarily be confined to competition in banking, where both classes stand upon an equal footing. The State, having plenary powers, may permit banking powers and fiduciary powers to be exercised by the same corporation, but Congress, having limited powers, and having only authority (and that by implication) to confer banking powers, cannot ignore constitutional restrictions and assume the unlimited powers of the State.

(*) As illustrating this point, the Tennessee statute which permits banks to exercise both classes of powers provides: (Shannon's Supplement of 1903, p. 525, Sec. 6)

"None of the property, means, effects, funds, assets, or any other thing held by such bank as executor, administrator, guardian, receiver, commissioner, assignee, trustee, agent or attorney in fact shall be assumed, counted, or taken into consideration as assets or liabilities of said bank in making the statement required by law to be published of and concerning the affairs, business and conditions of said bank."

The excuse for competition vanishes entirely when it is proposed to grant fiduciary powers to national banks in Michigan to enable them to compete with state banks, as state banks in Michigan are not permitted to exercise fiduciary powers.

(d) *Trust companies are not instrumentalities of the Federal Government; their functions are purely private, and they are, therefore, subject to the exclusive jurisdiction and control of the State.*

The distinction between banks and trust companies under the laws of the State of New York was considered in *Mercantile Bank vs. N. Y.*, 121 *U. S.* 159, in which Mr. Justice Matthews says:

> "Trust companies, however, in New York, according to powers conferred upon them by their charters and habitually exercised, are not in any proper sense of the word, banking institutions. They have the following powers: To receive moneys in trust and to accumulate the same at an agreed rate of interest, to accept and execute all trusts of every description committed to them by any person or corporation or any court of record, to receive title to real or personal estate on trusts created in accordance with the laws of the State, and to execute such trusts, to act as agent for corporations in reference to issuing, registering and transferring certificates of stock, bonds and other evidences of debt, to accept and execute trusts for married women in respect to their separate property, and to act as guardian for the estates of infants. * * *
>
> It is evident from this enumeration of powers that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce."

In *Jenkins vs. Neff*, 186 *U. S.* 237, it is said:

> "Trust companies are not organized primarily for banking purposes; they are designed for other purposes, as pointed out in the *Mercantile Bank* case, and it never was the purpose of the Federal Government to interfere with the policy of the State in reference to the formation and development of such corporations as it should judge expedient, even though

> it should be found necessary to invest them with some of the powers of banking associations as an inducement to perform the other duties and obligations imposed by the State."

Under the Michigan law the powers of trust companies are substantially the same as those under consideration in the New York cases above cited; and the distinction between banks and trust companies is further emphasized in Michigan by a specific provision of the Trust Company Act, as follows:

> "But nothing herein contained shall be construed as giving the right to issue bills to circulate as money or to buy or sell bank exchange or do a general banking business."
>
> 3 *Howell's Stats., 2nd Ed., Sec.* 6484.

Trust companies are also recognized as being distinct from banks in Article XII., Section 9, of the Michigan Constitution of 1908, as follows:

> "No general law providing for the incorporation of *trust companies* or *corporations for banking purposes* or regulating the business thereof shall be adopted, amended or repealed except by a vote of two-thirds of the members of each house of the legislature."

(e) *It is well settled that a State has exclusive jurisdiction and authority over persons and property within its borders.*

The tenth amendment to the Federal Constitution is as follows:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

In the leading case of *Penoyer vs. Neff*, 95 *U. S.* 722, Mr. Justice Field says:

> "The several States of the Union are not, it is true, in every respect independent; many of the rights and powers which originally belonged to them being now vested in the government created by the constitution;

but except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them. *One of these principles is that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.* As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, and the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced, and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed and transferred."

This principle has been frequently affirmed by this Court.

Overby vs. Gordon, 177 *U. S.* 214, 222.
Brown vs. Fletcher's Estate, 210 *U. S.* 82, 89.
U. S. vs. Fox, 94 *U. S.* 320.
Mich. Trust Co. vs. Ferry, 228 *U. S.* 353.

The right of the State to exclusive jurisdiction over property within the State has also been established by the Michigan Courts.

Dickinson vs. Seaver, 44 *Mich.* 624.
Lafferty vs. Peoples Sav. Bank, 76 *Mich.* 35.
American Missionary Assn. vs. Hall, 138 *Mich.* 247.

The creation and management of trusts, the administration of estates and the acting as registrar of stocks and bonds are all peculiarly matters for State regulation. They relate exclusively to private rights, and have nothing whatever to do with the affairs of the Federal Government. For Congress to attempt to control or regulate such matters is to invade the sovereignty of the State assured by the tenth amendment.

(f) *Even consent on the part of a State Legislature permitting Congress to exercise dominion over the subjects included in Section* 11 (k) *would not be effective.*

A State, because of its plenary control, may authorize a trust company to engage in banking, in addition to conducting the usual trust business, or a State bank to exercise trust powers, but a State Legislature has no power to change a status established by both the State and Federal Constitutions, by consenting that Congress may trespass upon the exclusive jurisdiction of the State over the subjects under consideration, neither can it grant to Congress powers not conferred upon that body by the Federal Constitution. It is elementary that where jurisdiction over the subject matter is withheld by law parties can not create or confer it by consent. The powers and functions sought to be covered by section 11 (k) are reserved to the States and neither expressly nor by implication delegated to the Federal Government. Consent can not change this unless it be given in a constitutional amendment enacted as the constitution provides.

POINT II.

Neither Congress Nor the State Has Prescribed the Laws Under Which a National Bank May Act as Trustee, Executor, Administrator or Registrar of Stocks and Bonds.

It is obvious that there must be some laws under which these fiduciary powers, if granted, are to be exercised.

(a) *Congress, in the National Banking Act and the Federal Reserve Act, has provided rules and regulations, in minute detail, for the exercise of all of the banking powers conferred upon national banks by those acts. It has prescribed nothing respecting the fiduciary powers contained in Section* 11 (*k*).

If the fiduciary powers under consideration were incidental to the banking powers exercised by national banks, it would be imperative for Congress to pass laws regulating their administration. This would necessitate a body of laws

defining and regulating trusts, providing for the descent of property of deceased persons, fixing the status of stocks and bonds and regulating their issue.

It is not the province of the State to prescribe how the powers of national banks shall be exercised. Congress alone can pass the laws required for such purpose.

First Nat. Bank vs. Converse, 200 *U. S.* 425.

(b) *On the other hand, the State, having exclusive jurisdiction over all of the subjects included in the section under consideration, has expressly asserted its authority over each of them as follows:*

(1) The State laws define and regulate trusts and prescribe how, when and to what extent they shall be administered.

Howell's Stats., 2nd Ed., Chap. 285.

(2) The State laws provide for the descent of property of deceased persons, both real and personal, how the property shall be administered and by whom. (*H. S. Chaps.* 290 to 301, *inclusive.*) The probate court is expressly vested with authority to appoint administrators in the case of intestate estates (*H. S. Sec.* 11039); and to grant letters testamentary to an executor named by will "if he is legally competent." (*H. S. Sec.* 11026.)

The probate court is thus charged with the duty of determining the competency of every person appointed either as executor or administrator.

The exclusive jurisdiction of the State over these matters has been expressly declared by the Supreme Court of the State.

Dickinson vs. Seaver, 44 *Mich.* 624.
Lafferty vs. Peoples Sav. Bank, 76 *Mich.* 35.
American Missionary Assn. vs. Hall, 138 *Mich.* 247.
Brown vs. Fletcher's Estate, 146 *Mich.* 401.

And such ruling has been approved, on appeal, by this Court.

Brown vs. Fletcher, 210 *U. S.* 82-89.

(3) The State laws in numerous cases fix the status of shares of stock and prescribe how they may be transferred;

and in the case of public service corporations, such as railroads, street railways and other common carriers, telephone and telegraph companies and companies furnishing light, heat, water, or mechanical power to the public, the issue of stocks and bonds is regulated by law and the Michigan Railroad Commission is vested with jurisdiction over the subject.

H. S., 2nd Ed., Sec. 9610.

No corporation has ever been authorized by the Michigan laws to administer trusts or to act as executor or administrator, except under acts specially adapted to such purposes and containing safeguards to insure the public against an improper exercise of the powers conferred. All such acts have now been merged in the present Trust Company Act (3 *H. S., 2nd Ed., Sec.* 6476); and no Michigan corporation, except when organized under this act, can lawfully act as trustee, executor or administrator. The act is a very comprehensive one, and contains many provisions which would be inapplicable to national banks and unenforceable against them. It requires a minimum capital of $300,000, except in cities of less than 100,000 inhabitants, in which case the minimum capital is $150,000; 50 per cent of the capital must be paid in, and the certificate of the Banking Commissioner of the State is required before the company can begin business. Not less than 50 per cent of the capital, provided said amount is not in excess of $200,000.00, must be invested in prescribed securities and deposited with the State Treasurer, as security for depositors and creditors. Included in such prescribed securities are notes and mortgages on unincumbered real estate within the State of Michigan, worth double the amount secured, which securities national banks are not authorized to hold. The act fixes the number and qualifications of directors and imposes penalties for fraud, embezzlement, etc. It regulates the investments of the corporation and authorizes a lien in certain cases and imposes a double liability upon the stockholders. Corporations organized under the act are subject to complete supervision by the State Banking Commissioner. Quarterly and special reports are required, and penalties of various kinds are imposed. A method of winding up such corporations is prescribed, including the power of appointment of a receiver; and in many other ways the act prescribes in detail how the business shall be conducted; a great part of the requirements being such as could not be complied with by a national bank.

The various laws upon these subjects constitute a large and important part of the general laws of the State.

(c) *None of these laws, however, can apply to national banks.*

A defaulting trustee, if a national bank, can not be punished under a State law. An executor or administrator misappropriating the estate in its hands or making a wrongful distribution of the assets can not be made to account in a State Court, and no other tribunal exists with jurisdiction in such a case. A double liability could not be imposed upon the stockholders of a national bank, although the stockholders of a Michigan trust company would be subject to such penalty in an appropriate case.

It is well settled that no power exists in a State to coerce a national bank, or to compel it to obey the State laws. This has been repeatedly declared by this Court.

The creation and regulation of national banks belong exclusively to the United States.

> "The charter of incorporation (of a national bank) not only creates it, but gives it every faculty which it possesses; the power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by the law of the United States. It is not only itself the mere creature of the law, but all its actions and all its rights are dependent on the same law."
>
> *Osborn vs. Bank*, 9 *Wheat.* 823.

> "It is well settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers, except those expressly granted or which are incidental to carrying on the business for which they are established."
>
> *First Nat. Bank vs. Converse*, 200 *U. S.* 438.
>
> *California Nat. Bank vs. Kennedy*, 167 *U. S.* 362, and cases cited.

Exclusive control of national banks by the Federal Government is impossible if section 11 (k) is sustained. By its terms the fiduciary powers may be granted by special permit *"when not in contravention of State or local law."* Each State may thus decide for itself the extent of the powers which national banks may exercise within its borders. In other words, "State legislation, if permitted, might impose limitations and restrictions as various and as numerous as the States" (188 U. S. 229).

The section goes still further and authorizes the Federal Reserve Board to discriminate among national banks in the same State by special permit. The Board may in its discretion (which is not subject to review) and has in many instances granted full power to some banks, more restricted powers to others in the same State, and has refused other applications altogether.

Under such conditions uniformity in the system or exclusive control by the Federal Government is impossible.

In *Eaton vs. Iowa*, 188 *U. S.* 229, a question was presented whether a State could pass laws punishing offenses of officers and employes of banks organized and operating under the laws of the United States. Mr. Justice Shiras, in deciding that the States possessed no such power, said:

> "We think this view of the subject (that national banks are organized and their business prosecuted for private gain) is not based on a correct conception of the federal legislation creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of State legislation, which if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States. Having due regard to the national character and purposes of that system, we cannot concur in the suggestion that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain. The principles enunciated in *McCulloch vs. Maryland*, 4 *Wheat.* 316, 425, and in *Osborn vs. U. S. Bank*, 9 *Wheat.* 738, though expressed in respect to banks incorporated directly

by acts of Congress, are yet applicable to the later and present system of national banks."

Christopher vs. Norvell, 201 *U. S.* 225.
Yates vs. Jones Nat. Bank, 206 *U. S.* 178.
People vs. Fonda, 62 *Mich.* 401.

The conclusion is inevitable, that there are no laws, which national banks upon which these fiduciary powers may be conferred, can be compelled to obey in the administration of them.

It must also be conceded that no legislative body can confer either upon corporations or individuals powers affecting private rights, to be exercised according to the will of the grantee and without restriction. Our government is a government of laws, and not of men.

POINT III.

Even if Congress Possesses the Power to Legislate Concerning the Subjects Included in Section 11(k), it can not Delegate that Power to the Federal Reserve Board.

If, as already pointed out, the subjects under consideration are beyond the jurisdiction of Congress, that body can not confer upon the Federal Reserve Board a power which it does not itself posses. But, conceding, *arguendo*, that Congress might take cognizance of these matters, its legislative power over them must be exercised by itself alone.

(a) *The general principle is well settled that legislative powers cannot be delegated.*

Article I., Section 1, of the Constitution of the United States, provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

> "One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department

to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain, and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall devolve, nor can it substitute the judgment, wisdom or patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."
Cooley Constitutional Limitations, 6 *Ed.,* 137.

In the leading case of *Field vs. Clark,* 143 *U. S.* 694, it is said:

"The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend."

The ruling in this case has been followed in all of the later cases in this Court where the question has arisen.

St. Louis Consolidated Coal Co. vs. Illinois, 185 *U. S.* 210.
Buttfield vs. Stranahan, 192 *U. S.* 470.
Union Bridge Co. vs. U. S., 204 *U. S.* 364, 385.
U. S. vs. Grimaud, 220 *U. S.* 506.
Red "C" Oil Co. vs. North Carolina, 222 *U. S.* 394.
Interstate Com. Com'n vs. Transit Co., 224 *U. S.* 214.

The distinction is well stated by Ranney, J., in *Cincinnati, Etc., R. R. Co. vs. Commissioners of Clinton Co.,* 1 *Ohio St. R.* 88, as follows:

"The true distinction is between the delegation of of power to make the law, which necessarily involves a discretion as to what it shall be and the conferring of authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made."

This distinction is illustrated by a comparison between the laws of Michigan and Minnesota relative to the issuing of stock by railroad companies.

The Michigan Statute (Sec. 9610 H. S., 2nd Ed.) prescribes the terms, conditions and limitations under which stock can be issued, and the Michigan Railroad Commission is authorized to make inquiry as to whether in fact a railroad company desiring to issue stock has complied with the law, in which event the Commission " shall grant authority to make the issue applied for."

Unlike Michigan, the Minnesota Legislature has never enacted any terms, conditions or limitations with reference to the increase of capital stock by railroad companies, but Sec. 2872 of the Revised Laws of 1905 provides:

> "Before any railroad corporation shall increase its capital stock it shall apply to the Railroad and Warehouse Commission, in writing, setting forth the amount of the proposed increase and the purpose for which it is desired. The commission shall thereupon fix a time and place for hearing the application and require such notice thereof to be given as they may deem reasonable. Upon the hearing the commission shall make findings of the facts established in reference to the proposed increase, and, if they allow it, shall prescribe the manner in which and the terms upon which the same shall be made. If they disapprove such increase, the reasons therefor shall be stated in their next annual report. No capital stock shall be issued by any railway corporation until the full amount thereof has been paid to the corporation in money, labor or materials actually used in the construction of its road, nor shall the capital stock of any such corporation be increased except by special authority of such Railroad and Warehouse Commission."

The authority thus attempted to be given to the Minnesota Railroad and Warehouse Commission is identical in character with that which Congress has sought to confer upon the Federal Reserve Board, which reads as follows:

> "The Federal Reserve Board shall be authorized and empowered * * *
>
> (k) To grant, by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds, under such rules and regulations as the said Board may prescribe."

The constitutionality of the Minnesota law arose in the case of *State vs. Great Northern Ry. Co.*, 100 *Minn.* 445. The Great Northern Railway increased its capital stock without applying to the Railroad and Warehouse Commission for authority to do so, and the State attempted to enjoin the Railway Company from issuing such increased stock until authority had been granted by the Commission. The Supreme Court, in denying the injunction, among other things, said:

> "The terms and conditions upon which railway corporations may be created, the powers and capital stock they may have, the purposes for which they may increase their capital stock, and the limitations and conditions to be imposed upon the right to such increase are exclusively matters for legislative action, which cannot be delegated. The State having created such corporations and conferred upon them for public purposes great and extraordinary powers and franchises, including the sovereign power of eminent domain and the right to levy tolls or taxes upon all who use for traffic or travel the modern highways, the railroads, it logically follows that the Legislature has the undoubted right to enact statutes regulating the increase and disposition of their capital stock.
>
> In the exercise of this right it may pass a statute providing generally for what purposes and upon what terms, conditions and limitations an increase of capital stock may be made, and confer upon the commismission the administrative duty of supervising any proposed increase of stock. It may also delegate to the commission the duty of finding the facts in each particular case, and authorize and require it, if it find the existence of facts that bring the case within the statute, to allow the proposed increase; otherwise, to refuse it. *Any statute, however, which attempts to authorize the commission in its judgment to allow an increase of the capital stock of a corporation for such purpose and on such terms or conditions as it may deem advisable, would be a delegation of legislative power and void.*"

The whole subject has been comprehensively treated by the Michigan Supreme Court and the principles above stated approved in the case of *King vs. Concordia Fire Ins. Co.*, 140 *Mich.* 258-267.

(b) *By the terms of this section, complete authority over the subject has been delegated to the Federal Reserve Board.*

There is nothing in the section or in the other parts of the act which indicates any intention on the part of Congress itself to grant any additional powers to national banks. Under the National Banking Act Congress was very careful to specify, in detail, the powers which it intended to confer upon the banks, and if it had been the intention of Congress to itself grant additional powers to all national banks, language apt for that purpose would have been used, instead of that which appears in Section 11 (k). By this section it is expressly provided that the *Federal Reserve Board,* not Congress, shall have power "*to grant, by special permit, to national banks applying therefor, when not in contravention of state or local law, the right to act,*" etc. There can be but one meaning attributed to this language. No powers are to be conferred upon any national bank until the Federal Reserve Board has determined, *first,* whether to grant such powers would contravene a state or local law; *second,* what powers shall be conferred upon each particular bank; and *third,* under what rules and regulations the powers granted shall be exercised. It rests entirely with the Federal Reserve Board, and not with Congress, to grant, by special permit, to such banks as it may determine, the right to exercise such powers as the Board is pleased to confer.

In practice the Board has granted greater powers to some banks than it has to others. To some it has granted full powers to act as trustee, executor, administrator and registrar of stocks and bonds; to others lesser rights, as follows: Trustee, executor and administrator; trustee and registrar of stocks and bonds; trustee alone; and registrar of stocks and bonds alone.

The language used is not honestly susceptible of the construction, which some have attempted to put upon it, that Congress has by the passage of that section expressly conferred upon all national banks the powers stated in the section. It rests in the discretion of the Federal Reserve Board to determine what powers may be exercised by particular banks and what limitations or restrictions shall be placed upon the exercise of such powers.

(c) *The Federal Reserve Board exercises legislative power when it grants to a national bank, by special permit, the right to act as trustee, etc.*

Prior to the passage of the Federal Reserve Act national banks could only exercise the corporate powers specified in the National Banking Act. It must be conceded that unless additional powers are conferred upon national banks, it would be *ultra vires* on their part to exercise them. The adoption of the section by Congress is, of itself, a legislative admission to that effect. Only Congress can confer such additional powers. There is no difference in this respect between creating a corporation with specified powers and the granting of additional powers to a corporation already in existence. No one will contend that Congress could delegate to individuals authority to create a corporation and endow it with corporate powers. This being true, it is equally clear that Congress cannot delegate to the Federal Reserve Board authority to confer upon a particular bank powers which it does not otherwise possess. By the express provisions of the section, it is the Federal Reserve Board which is to grant the right to act. The discretion which is to be exercised is that of the Federal Reserve Board, not that of Congress. It is the Federal Reserve Board which is to determine, by special permit, what powers shall be conferred upon particular banks, the extent of them and in what manner they shall be exercised. This discretion is legislative in character. There is a sharp line of distinction between such action and the making of administrative rules for the determination of facts upon which the right to exercise powers granted by legislative authority may depend.

Field vs. Clark, 143 *U. S.* 694.
U. S. vs. Grimaud, 220 *U. S.* 520.

(d) *The Federal Reserve Board has adopted rules and regulations and has issued instructions to its agents prescribing how applications for trustee powers shall be made and directing that funds, securities and investments shall be kept in separate departments, copies of which are appended to this brief. No attempt is made to prescribe the laws in accordance with which the powers must be exercised.*

According to these rules and regulations, the granting

of special permits is a matter of grace and favor on the part of the Federal Reserve Board. No bank, however worthy or well qualified, is entitled of right to be granted the powers specified in the section. If the examiners think "that the directors do not direct or are lax or negligent in their attendance at board meetings, or in giving attention to the bank's management and direction," the Federal Reserve Board will not "as a rule" grant the right to act to such bank. The same is true in cases where the Federal Reserve agents report that the management is not strong "from a moral standpoint," or where such agents "feel that the officers of the bank, as individuals, would not be worthy of being entrusted with the management of trust funds or the administration of estates." These instructions indicate that the Federal Reserve Board does not even contemplate the exercising of its own discretion in these matters, but intends to rely upon the ex-parte opinions of its agents. Other similar conditions are specified in the instructions of the Board to their agents, failure to comply with which will "as a rule" defeat an application of a bank; but it will be noted that no rules are definitely laid down the observance of which will entitle a qualified bank to the powers, as a matter of right. A truly utopian and parental plan, but one well-calculated to give rise to reflection when it is considered that the members of the Federal Reserve Board, however honest or well-meaning they may be, are not the representatives of the people or chosen by them, but are appointees of the administration and responsible to no one but the power that appoints them.

The right to act once granted by the Federal Reserve Board to a national bank, there is no law, Federal or State, nor even a regulation of the Federal Reserve Board determining in what manner the power so conferred shall be administered. The bank is left to proceed at will, without rule or guidance, and responsible to no one—a ship without rudder, chart or compass—an intolerable condition in a country governed by law.

It is respectfully submitted that the judgment of the Michigan Supreme Court should be affirmed.

HENRY M. CAMPBELL,
JOHN G. JOHNSON,
Counsel for Defendants in Error.

Regulation F, Series of 1916.

FEDERAL RESERVE BOARD.

Washington, Oct. 1, 1916.

NATIONAL BANKS AS EXECUTORS AND TRUSTEES.

I.

Statutory Provisions.

The Federal Reserve Act provides:

"Sec. 11. The Federal Reserve Board shall be authorized and empowered.

"(k) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds, under such rules and regulations as the said Board may prescribe."

II.

Applications.

1. A national bank desiring to exercise any or all of the privileges authorized by Section 11, subsection (k), of the Federal Reserve Act, shall make application to the Federal Reserve Board on a form approved by said Board (Form No. 61). Such application shall be forwarded by the applying bank to the Chairman of the Board of Directors of the Federal Reserve Bank of its district, and shall thereupon be transmitted to the Federal Reserve Board with his recommendations.

III.

Separate Departments.

Every national bank permitted to act under this section shall establish a separate trust department, and shall place such department under the management of an officer or officers, whose duties shall be prescribed by the board of directors of the bank.

IV.

Provisions for Keeping Trust Funds.

The funds, securities and investments held in each trust shall be held separate and distinct from the general funds and securities of the bank, and separate and distinct one from another. The ledgers and other books kept for the trust department shall be entirely separate and apart from the other books and records of the bank.

V.

Examinations.

Examiners appointed by the Comptroller of the Currency or designated by the Federal Reserve Board will hereafter be instructed to make thorough and complete audits of the cash, securities, accounts and investments of the trust department of every bank at the same time that examination is made of the banking department.

VI.

Conformity with State Laws.

Nothing in these regulations shall be construed to give to a national bank doing business as trustee, executor, administrator, or registrar of stocks and bonds under Section 11 (k) of the Federal Reserve Act any rights or privileges in contravention of the laws of the State in which the bank is located.

VII.

Revocation of Permits.

The Federal Reserve Board reserves the right to revoke permits granted under these regulations in any case where in the opinion of the Board a bank has willfully violated the provisions of these regulations or the laws of any State relating to the operations of such bank when acting as trustee, executor, administrator, or registrar of stocks and bonds.

VIII.

Changes in Rules.

These regulations are subject to change by the Federal Reserve Board; provided, however, that no such change shall prejudice obligations undertaken in good faith under regulations in effect at the time the obligation was assumed.

CHARLES S. HAMLIN,
Governor.

H. PARKER WILLIS,
Secretary.

CIRCULAR LETTER TO FEDERAL RESERVE AGENTS.

Application for Trustee Powers.

By direction of the Board this letter is sent for your guidance in passing upon the applications of national banks for the privilege of exercising the powers of trustee, registrar, executor and administrator.

All applications from applying banks must be transmitted first to the Federal Reserve agent of the district in which the bank is located, who will forward the applications with his recommendations to the Federal Reserve Board. The Federal Reserve agent in making his recommendations is expected to take into consideration the general standing of the bank, character of its management and its fitness to exercise the fiduciary powers applied for, as well as the benefits that the community in which the bank is located will be apt to receive from the exercise of such powers by the bank. Special weight will be given by the Federal Reserve Board to the approval or disaproval of the Federal Reserve

agent. Applications that are recommended by him for approval will be referred by the Board to a committee which, after careful examination of the records on file in the office of the Comptroller of the Currency relating to the business and the management of the bank, will report to the Board favorably or adversely, as the case may be, upon application.

In addition to the points above outlined the Board's committee considers the strength of the bank as shown by its statements and by the examiner's reports, and especial weight is attracted to the observance on the part of the bank of the requirements of law and of the regulations and admonitions which are sent out from time to time by the Comptroller's office.

It is not, as a rule, deemed advisable to grant permits for the exercise of fiduciary powers to a national bank:

(1) Where its surplus does not amount to at least twenty per cent of its capital stock.

(2) Where reports show that it is carrying an excessive amount of past due or doubtful paper.

(3) Where it is carrying real estate loans not authorized by law.

(4) Where it is shown that the bank is in the habit of granting excessive overdrafts continuously.

(5) Where the loans of the bank are not well distributed, by reason of an excessive proportion of the total loans having been granted to a few interests, or where loans made to officers and directors are too large in proportion to the total amount of loans, or are not well secured.

(6) Where the examiners have reported that the directors do not direct or are lax or negligent in their attendance at board meetings or in giving attention to the bank's management and direction.

Federal Reserve agents, in making their recommendations, are expected to pay particular attention to the strength of the management of the bank from a moral standpoint, and should decline to recommend any application where they feel that the officers of the bank, as individuals, would not be worthy of being entrusted with the management of trust funds or the administration of estates.

September 10, 1915.

Federal Reserve Bulletin,
October, 1915, p. 308.

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IN THE

Supreme Court of the United States

October Term, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN, PLAINTIFF IN ERROR.

vs.

GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY ET AL.

In Error to the Supreme Court of the State of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD S. CLARK,
Attorney for Plaintiff in Error.
H. M. GILLETT,
Of Counsel.

25,594.

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IN THE

Supreme Court of the United States

October Term, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, PLAINTIFF IN ERROR,

v.

GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN ON THE RELATION OF UNION TRUST COMPANY ET AL.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The Attorney General of the State of Michigan on the relation of all of the trust companies doing business in that state filed in the Supreme Court of Michigan an information in the nature of a quo warranto for the purpose of testing the validity of Section 11 (k) of the Federal Reserve Act, so-called, by virtue of which the respondent (now plaintiff in error) had obtained a permit from the Federal Reserve Board to act as trustee, executor, administrator and registrar of stocks and bonds. (Rec., pp. 1-4).

The plaintiff in error filed its plea (Rec., pp. 4-10) reciting its incorporation as a national bank and the issuance of a certificate by the Federal Reserve Board. The relators (now defendants in error) demurred to the plea on three grounds. (Rec., p. 11).

> *First,* on the ground that section 11 (k) is unconstitutional "in that Congress is not authorized by the constitution of the United States to confer upon national banks the corporate powers specified in said section."
>
> *Second,* because even if congress itself possessed the right to confer upon national banks the corporate powers specified in section 11 (k), it cannot lawfully delegate such authority to the Federal Reserve Board.
>
> *Third,* because the granting of the corporate powers specified in said section 11 (k) by the Federal Reserve Board to the respondent is in contravention of the laws and policy of Michigan.

Section 11 (k) of the act is as follows:

> "The Federal Reserve Board shall be authorized and empowered * * *
>
> (k) To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds, under such rules and regulations as the said board may prescribe."

Counsel for the Federal Reserve Board filed a brief and participated in the oral argument by leave of Court.

The decision of the Supreme Court of Michigan was handed down on September 26, 1916, and is not yet officially reported, but is found in Volume 159 of the Northwestern Reporter on page 335 and on pages 15 to 23 of the record. Two opinions were filed, one by Mr. Justice Brooke and the other by Mr. Justice Ostrander. The latter is designated as a "concurring" opinion, but reached an opposite conclusion from that of the former in respect to the question

whether the powers granted were "in contravention of state or local law." This question was decided in the negative by Mr. Justice Ostrander with whom the other justices concurred. Section 11 (k) was held invalid as beyond the constitutional powers of Congress. The court found it unnecessary to pass upon the question of the alleged unlawful delegation of legislative powers.

SPECIFICATION OF ERRORS.

There are only two questions raised by the assignment of errors. (Rec., p. 25).

(1) Did the Supreme Court of Michigan correctly hold that the enactment of Section 11 (k) transcended the constitutional powers of Congress?

(2) If the above question is answered in the negative, can the conclusion of the Supreme Court of Michigan be sustained upon the second ground of demurrer, viz.: The claimed unlawful delegation of legislative powers?

SYNOPSIS OF ARGUMENT.

Question No. 1. The Constitutional Powers of Congress.

I. General Principles.

A. Changing conditions and the exigencies of modern business must always be considered in defining the implied powers of Congress.

B. In carrying into effect its lawful powers (whether express or implied) Congress has full discretion in respect to the selection of methods and means.

II. Alternative Theories.

The validity of the legislation now attacked can be upheld either

A. By recognizing it as the exercise by Congress of powers not previously defined, but necessarily and properly exercised to meet modern conditions.

B. By treating it as a mere administrative detail connected with the exercise of powers which are already clearly defined.

Without abandoning the first of these theories, we rely on the second for the following reasons:

1. Sec. 11 (k) does not create a new class of corporations, but is merely designed to promote the efficiency and protect the business of national banks.

2. That this is a lawful object, has been clearly determined by this court. The reasons for this determination are now immaterial.

3. The selection of methods and means to promote this lawful object is therefore within the discretion of Congress. The only limit to this discretion is the necessity of connecting the legislation with the legitimate business of national banks.

4. In applying this test, no legislation should be condemned unless its provisions are affirmatively shown to be entirely foreign to the business of banking. All presumptions are in favor of the validity of the legislation.

5. The powers conferred by Section 11 (k) are not beyond the constitutional powers of Congress when tested by the above rules.

Question No. 2. Delegation of Legislative Authority.

The discretionary powers given to the Federal Reserve Board are mere matters of administrative detail and may be justified either

(1) As the ascertainment of the contingencies upon which the act shall take effect, or

(2) As the granting or withholding of a license to carry on a business which is a proper subject of congressional regulation.

ARGUMENT.

I. (A) The Implied Powers of Congress.

Any argument upon this subject must necessarily commence with the case of

McCulloch v. Maryland, 4 Wheat., 316.

This case is important not only because it is the foundation of the national banking system, but also because of its full discussion of the question of implied powers. On this subject Chief Justice Marshall said:

> "Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental, or implied powers; and which requires that everything granted shall be expressly and minutely described. * * * * A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its import-

ant objects designated and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. * * * The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." (pages, 406-410) * * *

But the argument on which most reliance is placed is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. * * * This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers

on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which if forseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislative of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation, that we shall be compelled to discard it." (pages 413-416). * * *

The result of the most careful and attentive consideration bestowed upon this clause, is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are

not to be transcended. But we think the sound construction of the constitution, must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (pages 420-421).

McCulloch v. Maryland, 4 Wheat., 316.

The bank referred to in the above opinion was the Second Bank of the United States created by special act of Congress, but it has been held that the reasoning of the opinion is equally applicable to banks incorporated under the National Bank act.

Farmers, etc., Bank v. Dearing, 91 U. S., 29.
Eaton v. Iowa, 188 U. S., 220.

Other familiar decisions of this court defining and enlarging the implied powers of Congress are the following:

Stewart v. Kahn, 11 Wall. 493 (507).
Julliard v. Greenman, 110 U. S. 421.
Knox v. Lee, and Parker v. Davis, (Legal Tender cases), 12 Wall., 457.
Dooley v. Smith, 13 Wall., 604.
Ex-parte Yarbrough, 110 U. S., 651 (658).
Luxton v. Bridge Co., 153 U. S., 529.
U. S. v. Gettysburg Electric R. Co., 160 U. S. 668 (681).
Wilson v. Shaw, 204 U. S., 24.

The majority opinion of Mr. Justice Strong in the "Legal Tender Cases" gives a long list of illustrations, following with the general statement that:

"The whole history of the government and of congressional legislation has exhibited the use of a very

wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or if questioned, sanctioned by this court."

I-(b) The Congressional Discretion.

The following decisions of this court illustrate the wide range of discretion possessed by Congress in respect to the selection of methods and means to carry its lawful powers into execution.

U. S. v. Fisher et al, 2 Cranch 358 (396).
Martin v. Hunter, 1 Wheat. 304 (326-7).
Farmer's etc. Bank v. Dearing, 91 U. S., 29.
Ex parte Rapier, 143 U. S. 110 (134).
Logan v. U. S., 144 U. S. 263 (283).
Int. Com. Com. v. Brimson, 154 U. S., 447 (471).
Boske v. Comingore, 177 U. S., 459 (468-69).
Champion v. Ames, 188 U. S., 321 (355).
Northern Securities Co. v. U. S., 193 U. S., 197 (336).
McCray v. U. S., 195 U. S., 27 (55-56).
Hipolite Egg Co., v. U. S., 220 U. S., 45 (58).
Flint v. Stone Co., 220 U. S., 107 (175-176).
McDermott v. Wisconsin, 228 U. S., 115 (128).

If a power is within the limits of the congressional discretion,

> "the influence which its constituents possess at elections are * * * the sole restraints on which they have relied to secure them from its abuse."
>
> *Interstate Commerce Commission v. Brimson* (supra).

II. ALTERNATIVE THEORIES.

(A) Section 11 (k) Considered as the Exercise of Implied Powers Not Heretofore Expressly Denied.

For the sake of the argument, we might safely concede the existence of a marked dissimilarity between the powers granted by Section 11 (k) and the normal powers of national banks. We might go even farther and concede that Section 11 (k) virtually creates a new class of corporations, in the nature of national trust companies. Even with these concessions, we might properly contend that the same principles which in the McCulloch case were held to justify the creation of the Second Bank of the United States, will now justify the creation of any type of corporation which in the opinion of Congress will promote the interests of the Federal Government.

The term "moneyed corporation" has long been used to denote corporations which deal in money and in the business of lending money. Trust companies have been held to be "moneyed corporations."

Platt v. Wilmot, 193 U. S., 602.

It is true that this decision was based upon the terms of the New York statute, but a modern trust company must be considered a "moneyed corporation" under any definition of that phrase which can be framed.

Any type of "moneyed corporation" might have been and might now be properly used by Congress as an agency in conducting the fiscal affairs of the govenment. There is no justification for the exclusion of all types not in common operation at the date of the decision of the McCulloch case.

(B) Sec. 11 (k) Considered as an Incidental Administrative Detail.

1. *No New Class of Corporations Created.*

Without abandoning the position above stated, we consider the provisions of Section 11 (k) not as creating a new type of corporation, but merely as granting to national banks certain new powers and privileges, as an incident to the successful prosecution of their business as banks.

The two theories are entirely distinct. On the one theory, congress would be creating a separate class of corporations, which might or might not possess attributes which would justify their creation under the doctrine of the McCulloch case. On the other theory, Congress is merely giving corporations (whose creation is already authorized and approved) certain additional powers which Congress considers necessary for their successful operation. Upon this theory, the associations in question are none the less banking institutions, and as such are no less useful to the Federal Government, than before. Their powers are enlarged, not restricted, by the new legislation.

2. *The Legality of the Object in View, and the Immateriality of the Reasons Originally Expressed.*

We think that this view of the case tends to eliminate many of its difficulties. The statement that Congress has full discretion in the choice of methods and means to carry into effect its lawful powers gives a reasonably definite guide in respect to powers which are clearly defined. The greatest difficulty arises when we consider the powers which are not so defined either by the Constitution itself or the decisions of this court. In such a case we commence with an uncertain quantity which tends to create an uncertainty whether the legislation is to be considered as an unauthorized extension of the powers themselves, or as a discretionary selection of means and methods to effectuate authorized powers. However, as soon as any one of the im-

plied powers of Congress is defined and confirmed by the decisions of this court, it becomes in effect an express power. The language used by this court in the cases of

> *McCulloch v. Maryland,* 4 Wheat., 316, and
> *Osborn v. Bank,* 9 Wheat., 738 (860-861).

has in effect added to the constitution a provision which may be fairly stated as follows:

> "The Congress shall have power to provide for the incorporation and regulation of banking associations for the assistance of the Government in its fiscal operations and for the transaction of private banking business, and shall have power by appropriate legislation to promote the efficiency of such associations and to protect them in their trade and business."

The object of promoting the efficiency and protecting the business of national banks is therefore in itself a lawful object. By treating the decisions of this court as expressly legalizing this object, we eliminate from consideration the particular reasons given by Chief Justice Marshall for his approval of the incorporation of the Second Bank of the United States. These reasons become of no greater importance than the reasons which caused the members of the constitutional convention to adopt any section of the constitution itself. The mere fact that the congressional powers in respect to national banks were originally justified because of the public functions of such banks, and the assistance which they might give to the fiscal operations of the Government, cannot be considered as limiting all subsequent legislation to the promotion of these special objects. This conclusion is inevitable both from logical and practical considerations. Logically, the reasons which justify the creation of national banks should not necessarily limit their activities when created. Practically, the confinement of national bank legislation to provisions designed solely for the promotion of the banks' public functions would inevitably destroy every bank in existence. We think that the error of the Supreme Court of Michigan consisted in their conclusion that it was necessary to find some natural connection between the powers conferred by Section 11 (k) and the promotion of

the fiscal operations of the Government. Upon this point, the following quotations from the opinion of Chief Justice Marshall in the Osborn case are pertinent:

> "It (the bank) is undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possessed in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.
>
> "If there be anything in this distinction, it would tend to show that so much of the act as incorporates the bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence. * * * The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute. * * * Congress was of opinion that these faculties were necessary to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature."

Osborn v. Bank, 9 Wheat., 738 (860-4).

It is therefore not essential that it should appear that the particular powers conferred by Section 11 (k) are in themselves of a public nature or that they have in themselves any direct connection with the public functions of the national banks as agencies of the government. A very large part of the powers and privileges conferred upon these banks during the fifty years which have elapsed since the passage of the national bank act, have had no direct governmental connection, but have been designed merely to enable the banks to do business profitably and successfully. Anything which promotes their prosperity and enables them to compete with the state banks and trust companies indirectly promotes the interests of the government. If their privileges were so curtailed or their right of extension so denied as to prevent successful competition with state banks and trust companies, they would be driven out of existence and the government would lose such benefits as it derives from them. If the courts are to assume the responsibility of saying that the privileges conferred by this act are illegally conferred, because of their purely private nature, they have the right to go farther and to say that none of the powers and privileges granted by the original national bank act or any of its amendments can be upheld unless they have some direct connection with the public functions of the banks. Any such conclusion would inevitably close the doors of every national bank now in existence. It is therefore necessary to seek some test of the validity of such legislation other than the public nature of the powers conferred.

3. *The Limits of the Congressional Discretion.*

This court will naturally hesitate, as did the Supreme Court of Michigan, before holding that all legislation which tends in any way to promote the prosperity of national banks is for that reason valid. So broad a test might justify a direct donation from the public treasury, or a grant of authority to operate lotteries or manufacture automobiles. The logical construction lies somewhere between a narrow limitation to powers which directly promote the government's fiscal operations, and the granting of unlimited discretion. It seems plain that no more severe test should be applied

than the requirement that the efficiency to be promoted and the business to be protected should be that of the banks as banks. This merely means that the powers conferred should not be entirely foreign to the banking business. Unless all actual or possible connection with the banking business is negatived, Congress should not be considered as having abused its discretion.

4. *Presumptions and Burden of Proof.*

The decisions of this court uniformly hold that every reasonable presumption must be indulged in favor of the validity of an act of Congress.

U. S. v. Harris, 106 U. S., 629 (636).
U. S. v. Gettysburg Elec. R. R. Co., 160 U. S., 668 (681).
Boske v. Comingore, 177 U. S., 459 (470).
Fairbank v. U. S., 181 U. S., 283 (285).
Sweet v. Rechel, 159 U. S., 380 (392-393).
Knoxville v. Knoxville Water Co., 212 U. S., 1 (8).

One of the above cases holds specifically that

> *"if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."*
> *Sweet v. Rechel,* 159 U. S., 380 (393).

It is therefore, entirely legitimate for us to base our argument upon facts not proved, but which are within the realm of possibility. The defendants in error must suffer from all deficiencies of proof. If their contention that the powers conferred by Section 11 (k) have no legitimate connection with the banking business is based upon provable facts, these facts should have been proved upon an issue of fact raised in the supreme court of Michigan, and they should not have relied upon a demurrer to our plea. They must therefore now show affirmatively that the powers conferred cannot *by any possibility* have any legitimate connection with the banking business.

5. *Application of Above Rules to Section 11 (k).*

It is not quite fair to select any one of the powers conferred by section 11 (k) (for example, the power to act as the executor of a will) and to use this alone as a test of the validity of the legislation. The powers mentioned in Section 11 (k) are grouped together and conferred upon national banks because they have been grouped together for years in the operations of the banking corporations known as trust companies. They all to a greater or less degree involve a combination of fiduciary relations and financial operations. This combination of powers has been been found by experience to be a practical and efficient combination in case of trust companies and state banks, and it is presumably, for this reason, among others, that this combination has been incorporated into the provisions of Section 11 (k). That these powers have a legitimate connection with the operation of trust companies is settled by many years of experience. If the business of trust companies can, therefore, be shown to have a legitimate connection with the business of banking (or, more properly stated, if defendants in error are unable to negative this fact) then all of these powers may naturally and logically be conferred upon national banks, regardless of their relative value as compared with each other. The real question is, is there any such necessary dissemilarity between the business of trust companies and the business of national banks as to make the act of Congress in conferring upon the latter some or all of the functions of the former unconstitutional under the rules above laid down.

The mere fact that trust companies and banks are both "moneyed corporations" dealing with money as a commodity, ought to be enough to justify a negative answer to this question. Moreover, the differences between banks and trust companies are almost wholly matters of incidental development. A trust company is a bank of deposit which has developed along certain lines, and has assumed certain trust functions in addition to its banking functions. Banks of other types have developed in other directions. The orig-

inal bank however, resembled the modern trust company as closely as it resembled the modern bank.

The early banks were banks of deposit only. Their nature and development have been frequently discussed by this court.

The following case involved the application of the act of Congress of June 30, 1864, which imposed a tax upon the deposits of savings banks. Exemption from liability to taxation under the act was claimed by the complainant upon the ground that it was not a bank either in the popular sense or in the legal sense of that word, and that it had never transacted any banking business. It appeared that the corporation was organized for philanthropic purposes, to encourage habits of industry and economy by receiving and investing in government securities or in stocks, such small sums of money as might be saved from the earnings of workingmen. The articles of association provided that the corporation should not "issue any notes, make any discounts, or transact any business which belongs to or is transacted by incorporated banks other than is herein specified." All of the net profits were to be divided among the depositors, and various restrictions were imposed upon the nature of the securities in which the funds could be invested. The court held that the corporation was a bank. Mr. Justice Clifford, for the Court, said:

> "Obligation of repayment exists throughout, and it cannot make any difference as to the liability of the complainants in this case that the entries are made in a pass-book, and that the depositors can only obtain their deposits at certain stated periods. Deposits are made to be invested for the benefit of the depositors, and the bank is under obligations to repay the amount when demanded, agreeably to the by-laws and charter.
>
> 3. Only remaining condition to bring the case within the words of the body of the act is, that the deposits should be made with a person, bank, association, company or corporation engaged in the business of banking. Agreed case shows that the corpor-

ation complainants were engaged in receiving deposits and loaning the same on interest for the benefit of the depositors. Irrespective of the definition given to that phrase in the language of the proviso, the same conclusion must be adopted from the facts exhibited in the statement of the case, unless it can be established that the receiving of deposits by a chartered company, and loaning or investing the same for the benefit of the depositors, is not a business of banking.

Banks, in the commercial sense, are of three kinds, to-wit: 1, of deposit; 2, of discount; 3, of circulation. All or any two of these functions may, and frequently are exercised by the same association; but there are still banks of deposit, without authority to make discounts or issue a circulating medium. Ang. & Ames, Corp., Sec. 55; McCull, Com. Dict. p. 73.

'Banks for savings,' says McCulloch, 'are banks established for the receipt of small sums deposited by the poorer class of persons for accumulation at interest.' p. 146. Definition given by Grant is more extended, but it amounts to the same thing. Grant, Bank, 614. Courts of justice, also, as well as text writers, recognize the well known distinction between banks of deposit and banks of discount or circulation. Duncan v. Savings Inst., 10 G. & J., 309; People v. Utica Ins. Co., 15 Johns, 399; Grant, Bank, 1, 6, 614.

* * *

7. Fourth question presented for decision is, whether the moneys so received on deposit and invested, are deposits within the meaning of the act of Congress. Obviously the question as presented is substantially answered by the remarks already made in disposing of the preceding question. All the moneys received by the bank, whether for safe keeping or for investments, are deposits within the meaning of their by-laws, and within the very words of their charter. Answer to this question, also, must be in the affirmative."

Bank for Savings v. Field, 3 Wall., 495.

The following case was much like the Field case, but arose in California and involved a different statute. Mr. Justice Clifford delivered the unanimous opinion of the Court, saying:

> "Banks, in the commercial sense, are of three kinds, to-wit; 1, of deposit; 2, of discount; 3, of circulation. Strictly speaking, the term 'bank' implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like for safe keeping until the depositor should see fit to draw it out for use, but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes to loan money upon mortgage, pawn, or other security, and a still later period to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of those functions, but it is still true that an institution prohibited from exercising any more than one of those functions is a bank in the strictest commercial sense, and unless such a bank is brought within the proviso under consideration, is equally subject to taxation as if authorized to make discounts and issue circulation as well as to receive deposits." (Citing cases).
>
> "Tested by these considerations, it is clear that the judgment must be reversed unless it appears that the bank is within the proviso to the section which imposes the tax, and such was the decision of this court in a case involving the same question, though it arose under the prior act of congress levying internal revenue duties."
>
> *Oulton v. Savings Society*, 17 Wall., 109.

In a later case this court went even farther in this direction. The case involved the validity of a New York statute licensing private bankers. The complainant was engaged in receiving deposits in very small sums from time to time until they reached an amount sufficient to be sent to other

states, or foreign countries, principally the latter. He denied that he was in any sense a banker and claimed that the money was received for safe keeping and transmission only. Mr. Justice Holmes said:

> "The receipt of money by a bank, although it only creates a debt, is in a popular sense the receipt of money for safe keeping since the depositor can draw it out again at such time and in such sums as he chooses. * * * One form at least of the business aimed at and * * * carried on by the plaintiff is a branch of the banking business."
>
> *Engel v. O'Malley,* 219 U. S., 128 (136).

The supreme court of Wisconsin held that a department store which received deposits to be repaid either in cash or in merchandise at the option of the depositor, was a bank and subject to the laws regulating the banking business. The court say:

> "In modern times we have a variety of institutions that do a banking business in a popular sense, although the functions performed by them may be widely variant, and none of them may be doing all of the kinds of business included in the above definition. The business conducted by national banks differs from that done by state banks, in that the latter are not banks of issue, while the savings banks do not usually perform all of the kinds of business transacted by other banks. Trust companies that receive deposits and make loans perform two of the most important functions that are performed by banks generally, and for obvious reasons they are subject to regulation to the same extent that banks are."

The court cite Webster's definition of a bank of deposit as "one which receives money for safe keeping," and cite numerous authorities in support of their position.

> *MacLaren v. State,* 141 Wis., 577, 124 N. W., 667 (668).

The following case involved an Arizona statute taxing bank stock. The complainant claimed that it was not a

banking institution. It was engaged in the business of receiving money and investing it for its depositors by loaning it in their names and also of collecting rents and interest due on such loans. The interest and rents collected were subject to check. The corporation charged a commission on its loans to the borrowers and also a commission on the collection of interest and rents. The court held that it was a banking institution, citing the Oulton case and others.

Western Investment Banking Co. v. Murray, 6 Ariz., 215; 56 Pac., 728 (730).

There are other cases to the same effect, which have been decided by the state courts.

In certain states, the differences between savings banks and national banks are fully as great as those between national banks and trust companies. Nevertheless, they are still banks and the differences in question are entirely incidental and wholly subject to legislative control. Each of the three classes of institutions represents a development from the original bank of deposit, and the fact that trust companies have developed in one direction, savings banks in another, and national banks in a third, is a mere incident. The legislative body which controls each can either increase or diminish the similarity between them almost at will without going beyond the natural and legitimate scope of their operations. Even as now organized, the exercise of trust functions is not confined to any one of these three classes of corporations. National banks in receiving special deposits and in many other transactions incidentally act as trustees and cannot avoid doing so. The occasional assumption of fiduciary relations is almost a necessary incident of any active business. The business of both banks and trust companies therefore is a combination of fiduciary relations with financial operations, and the principal differences between them represent mere degrees of specialization.

This court can take judicial notice of the fact that in many of the states, trust companies are exercising all of the powers not only of banks of deposit, but also of banks of discount. This is a matter of common knowledge and the court must presume the existence of any fact which is

within the realm of possibility and which has not been negatived by the defendants in error.

That the powers granted by Section 11 (k) can be profitably, conveniently and appropriately combined with ordinary banking operations is demonstrated by their successful combination in the case of the trust companies and state banks. This very combination has created a class of competitors which may seriously affect the prosperity of national banks (and their consequent usefulness to the government) if they are not enabled by Congress to meet this competition. The trust companies and their counsel cannot logically say that the powers conferred by Section 11 (k) are inappropriate and foreign to the banking business, while trust companies are, at the same time, successfully carrying into effect the very combination which is attacked as illogical and unreasonable.

Our concession that the congressional discretion in respect to national banks may not permit the conferring of powers not germane to the banking business is made for the sake of the argument only. Possibly any such concession is unnecessary and improper. We make it because we think that it can be made without danger to our position. The term "banking business" is, however, used in the broadest possible sense. It is not to be confined to the business now transacted by national banks or by state banks or both. It means any business which can be transacted by a banking association of any kind without losing its character as such.

In determining what powers are germane to the banking business we must include within such powers all those which are ordinarily exercised by other institutions which come into competition with national banks. Competition necessarily involves similarity. The very existence of competition on the part of corporations, combining certain functions, shows that all of these functions are germane to each other.

The power to protect national banks in "their trade and business" must include the power to protect them against competition. This can only be done by granting to the

banks the same powers which are possessed by the competing trust companies.

The decision of the Supreme Court of Michigan was based entirely upon the conclusion that there was no natural connection between the exercise of the powers conferred by section 11 (k) and the carrying on of federal fiscal operations. The Michigan court were therefore testing the constitutionality of the section by false standards, and the correction of these standards must necessarily result in the reversal of their judgment.

Inasmuch as the Supreme Court of Illinois reached the same result as the supreme court of Michigan in

People v. Brady, 271 Ill., 100.

some discussion of the grounds of their decision is also required. The Illinois decision was based on the conclusion that it had not been "shown" by the bank that the powers conferred upon national banks by section 11 (k) "were reasonably necessary to the efficiency of such corporations for the purpose of their creation as governmental agencies." This position is unsound for several reasons.

1. It reverses the burden of proof.

2. It involves the assumption that no new banking legislation is valid unless it is connected with the public functions of the banks.

3. It ignores the fact that the "efficiency" of the banks "as governmental agencies" may be indirectly as well as directly promoted by Congress, and that their prosperity and success as private banking institutions are therefore legitimate objects of legislation.

4. It requires that the powers granted be "reasonably necessary" to the efficiency of the national banks. The proper test (if the congressional discretion is subject to any such test) is not that of necessity, but of tendency. The word "necessary" means "conducive."

U. S. v. Fisher, 2 Cranch, 358 (396).

If the powers conferred may by any possibility tend to promote or preserve the efficiency, prosperity, or success of these banks, it is not essential that they be either "necessary" or "reasonably necessary" for that purpose, in the sense in which these words are commonly used.

5. The Illinois opinion goes even farther than the requirement of "reasonable necessity" and requires a showing of universal necessity, arguing that the elective feature of the act is sufficient to condemn it when judged by this very novel and illogical test.

6. It entirely overlooks the existence of a legislative discretion which ought not to be controlled by the courts so long as it is confined to lawful channels. The test of "reasonable necessity" was applied when the creation of the Second Bank of the United States was approved, and is not to be again applied to each discretionary question of detail connected with the business of national banks.

Delegation of Legislative Powers.

There is, of course, a well recognized distinction between the delegation of legislative authority as such and the delegation of discretionary administrative powers. The decisions upholding this distinction may be roughly divided into two classes:

(1). Decisions which involve the delegation of discretion in respect to the ascertainment of the contingencies upon which an act shall take effect, or the decision of questions of administrative detail.

McCulloch v. Maryland, 4 Wheat., 316 (424).
Miller v. N. Y., 109 U. S., 385.
Stone v. Farmers' Loan & Trust Co., 116 U. S., 307.
Int. Com. Com. v. Ill. Cent. R. R. Co., 215 U. S., 452.
Int. Com. Commission v. C., R. I. & P. R. R. Co., 218 U. S., 88.
Oregon R. Co. v. Campbell, 230 U. S., 525, affirming same case in 173 Fed., 957 (978).
Field v. Clark, 143 U. S., 649.

Fallbrook Irrigation District v. Bradley, 164 U. S., 112 (178).
Ex-parte Kollock, 165 U. S., 526 (536-7).
Consolidated Coal Mining Co. v. Ill., 185 U. S., 203 (210-211).
Butterfield v. Stranahan, 192 U. S., 470 (496).
American Bridge Co. v. U. S., 204 U. S., 364 (387).
M. C. R. R. Co. v. Powers, 201 U. S., 245.
Red C. Oil Mfg. Co. v. Board of Agriculture, 222 U. S., 380 (394).
St. Louis, etc., Ry. Co. v. Taylor, 210 U. S., 281 (287).
U. S. v. Grimaud, 220 U. S., 406 (517 et seq.)

(2). Decisions which involve the creation of boards or commissions authorized to issue licenses and permits, or otherwise to select the individuals qualified or permitted to carry on a business regulated by general statute.

Davis v. Mass., 167 U. S., 43 (48).
Reetz v. Michigan, 188 U. S., 505.
Engel v. O'Malley, 219 U. S., 128 (137).
Bradley v. Richmond, 227 U. S., 477 (482).
Fisher v. St. Louis, 194 U. S., 361 (372).
New York v. Van De Carr, 199 U. S., 552 (562).

The powers delegated to the Federal Reserve Board by the legislation in question may be justified upon either or both of these theories.

The Supreme Court of Illinois even while holding section 11 (k) void as beyond the constitutional powers of Congress, held that it could not be invalidated as involving the unlawful delegation of legislative powers.

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Any more elaborate discussion of this question can be properly deferred until the filing of briefs on the part of the defendants in error.

The judgment of the Supreme Court of Michigan should be reversed and vacated.

Respectfully submitted,

Edward S. Clark

Attorney for Plaintiff in Error.

H. M. Gillett,
Of Counsel.